Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government engages in viewpoint discrimination in violation of the First Amendment when it denies eligibility for monetary benefits solely on the basis of an applicant's publicly expressed opposition to a government investigation.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were: (1) the Petitioner SKF USA Inc., and (2) the Respondents: the United States; the United States Customs and Border Protection; its Commissioner (Robert C. Bonner), in his official capacity; the United States International Trade Commission; its Chairman (Daniel R. Pearson), in his official capacity; and Timken U.S. Corporation.

Pursuant to Rule 35.3, the current Acting Commissioner of the United States Customs and Border Protection (Jayson P. Ahern) is automatically substituted for former Commissioner Robert C. Bonner in this Court. Similarly, the current Chairman of the United States International Trade Commission (Shara L. Aranoff) is substituted for former Chairman Daniel R. Pearson.

RULE 29.6 STATEMENT

Petitioner SKF USA Inc., a United States corporation, is a wholly owned subsidiary of AB SKF, a publicly owned corporation trading on the Swedish stock exchange.

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SKF USA Inc. ("SKF USA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit panel opinion is reported at 556 F.3d 1337 (Fed. Cir. 2009) and reprinted at App. 1a-52a (majority); 53a-100a (Linn, J., dissenting). The order denying *en banc* review and the opinion dissenting therefrom is reported at 583 F.3d 1340 (Fed. Cir. 2009). (App. 101a-108a.)

The decisions of the U.S. Court of International Trade ("CIT") are reported at 502 F. Supp. 2d 1325 (Ct. Int'l Trade 2007) and 451 F. Supp. 2d 1355 (Ct. Int'l Trade 2006). (App. 109a-155a.)

JURISDICTION

A divided panel of the Federal Circuit issued its opinions in this case on February 19, 2009. SKF USA filed a timely petition for rehearing *en banc* on April 3, 2009, which the court denied on September 29, 2009. (App. 101a-103a.) This Court has jurisdiction to review the Federal Circuit's decision under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Speech Clause of the First Amendment of the U.S. Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c (2000)) is set forth in the appendix at App. 160a-169a.

STATEMENT OF THE CASE

A federal trade statute – the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") – determines eligibility for funding on the basis of an applicant's public expression of support for a government trade investigation. Despite the viewpoint discrimination apparent on the face of this statute, a divided panel of the Federal Circuit affirmed its constitutionality under the less rigorous scrutiny reserved for commercial speech. The decision conflicts in numerous respects with this Court's First Amendment jurisprudence and with the decisions of other courts of appeals under similar circumstances. As much as $1 billion in distributions in over 40 pending cases are affected by the Federal Circuit's erroneous decision.

The CDSOA modified the government's handling of antidumping and countervailing duties collected by the federal government. Prior to the CDSOA, all such duties were deposited into the general treasury. In an effort to "effectively neutralize[]" the injury caused to domestic industries by sales of imported goods at less than fair value (*i.e.*, dumping),[1] Congress directed that the duties collected would henceforth be distributed on a *pro rata* basis to

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[1] Pub. L. No. 106-387, § 1002(1), 114 Stat. 1549A-72 (2000).

affected domestic producers. 19 U.S.C. § 1675c (2000). The Act limits qualifying domestic producers, however, to those that petitioned the government for the antidumping investigation that led to the imposition of duties and those that expressed affirmative support of the petition. *Id.* § 1675c(b)(1)(A). If a domestic producer did not, "by letter or through questionnaire response," indicate its public support for the investigation, that producer is denied a share of the proceeds. *Id.* § 1675c(d)(1).

Petitioner SKF USA is a domestic manufacturer in an industry subject to antidumping orders. SKF USA applied for a *pro rata* share of CDSOA distributions intended to remedy the effect of dumping on domestic producers in its industry. Applying the CDSOA's petition support requirement, federal agencies denied SKF USA's request because, twelve years earlier, it had voiced opposition to the government investigation that resulted in antidumping duties in its industry. SKF USA was otherwise entitled to such distributions but for its protected speech.

SKF USA successfully challenged the constitutionality of the CDSOA's petition support requirement in the CIT. On appeal, a divided panel of the Federal Circuit reversed, rejecting SKF USA's First Amendment viewpoint discrimination challenge. The full Federal Circuit, which exercises exclusive jurisdiction over the CIT and the statute at issue here, divided 8-4 in denying *en banc* review.

A. Statutory Scheme

1. Antidumping Investigations

Under the Tariff Act of 1930, a domestic producer may petition the Department of Commerce ("Commerce") and the International Trade Commission ("ITC") for relief from imports that are dumped into the U.S. market. 19 U.S.C. § 1673a (2006); *see* 19 C.F.R. § 351.202 (2009). If Commerce determines that the petition sufficiently alleges facts necessary for the imposition of a duty and is filed on behalf of the domestic industry, it proceeds with an investigation to determine whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value. 19 U.S.C. § 1673a(c)(2).

At the same time, the ITC initiates a preliminary investigation to determine whether the imports materially injure or threaten material injury to the domestic industry. 19 U.S.C. § 1673b(a)(1). As part of that investigation, the ITC issues a lengthy questionnaire to domestic producers, seeking detailed information on sales, pricing, customers, employment and other market data. App. 47a. The questionnaire has the force and effect of a subpoena; responses are mandatory. 19 U.S.C. § 1333(a) (2006); 19 C.F.R. § 207.8. It states on its first page: "This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession (19 U.S.C. § 1333(a))." App. 56a.

Among its initial questions, the questionnaire asks for the respondent's position with respect to the antidumping petition: "Do you support or oppose the

petition?" App. 57a. A respondent may check one of three boxes in response: "Support," "Oppose," or "Take no position." *Id.* The remaining questions seek empirical data to assist the ITC's assessment of injury to the U.S. industry. Respondents are required to certify the accuracy and completeness of their questionnaire responses. 19 C.F.R. § 208.6(c).

If, after full investigation, Commerce and the ITC reach final affirmative dumping and injury determinations, respectively, then an antidumping duty is imposed on the subject merchandise. 19 U.S.C. §§ 1673, 1673e (2006).

2. The Byrd Amendment

Antidumping duties historically have been deposited into general revenue accounts of the U.S. Treasury. In 2000, Senator Byrd altered the handling of those funds by adding a provision to an agriculture appropriations bill during conference committee negotiations. The resulting amendment, the CDSOA (also known as the "Byrd Amendment"),[2] avoided consideration by relevant congressional committees and full debate on the floor.[3]

The CDSOA instructs U.S. Customs and Border Protection ("Customs") to put all antidumping duties

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[2] Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c (2000)).

[3] *See* 146 Cong. Rec. 22,216, 22,220 (2000) (amendment "was not considered by [a] committee in either the House or Senate") (Rep. Kolbe); *see also PS Chez Sidney, LLC v. ITC*, 442 F. Supp. 2d 1329, 1339 n.21 (Ct. Int'l Trade 2006).

into special accounts, one for each antidumping duty order. 19 U.S.C. § 1675c(e); 19 C.F.R. § 159.64 (2009). At the end of each fiscal year, Customs distributes funds collected in those special accounts on a *pro rata* basis to domestic producers in each affected industry. 19 U.S.C. § 1675c(d)(3).

The CDSOA restricts eligibility for distributions to "affected domestic producers" that make "qualifying expenditure[s]" for specified purposes, such as manufacturing facilities, equipment, and research and development. 19 U.S.C. § 1675c(a), (b)(4). An "affected domestic producer" is a manufacturer or producer that "was a petitioner or interested party in support of the petition with respect to which an antidumping order . . . has been entered" and that "remains in operation." *Id.* § 1675c(b)(1); *see also* 19 C.F.R. § 159.61(b) (2009). The Act directs the ITC to compile a list of producers that either petitioned for the duties or "indicate[d] support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). Thus, in most cases, it is the producer's response to the ITC questionnaire's "support" question as part of the underlying investigation that determines eligibility for Byrd distributions. Customs makes the distributions only to those producers listed by the ITC. *Id.* § 1675c(d)(3).

3. Domestic and International Criticism of the Byrd Amendment

The CDSOA generated considerable controversy. In signing the appropriations bill, President Clinton

called on Congress to "override this provision, or amend it to be acceptable, before they adjourn."[4] Several foreign governments successfully challenged the law before the World Trade Organization, which authorized retaliatory measures.[5] President Bush repeatedly called for the repeal of the CDSOA. *See* Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act, GAO-05-979, at 2 (Sept. 2005) ("*GAO Report*").

In September 2005, the U.S. Government Accountability Office ("GAO") issued a detailed report critical of the CDSOA. According to the report, "because the statute requires support, only firms that check the 'support' box [on the ITC questionnaire] are considered eligible." *GAO Report* at 12. The GAO expressed "concern" regarding this support requirement, especially in its application to investigations that predated the enactment of the CDSOA. In those circumstances, "producers had no way of knowing [at the time of the investigation] that their lack of expression of support for the petition would later adversely affect their ability to receive CDSOA disbursements." *Id.* at 11.

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[4] Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, 36 Weekly Comp. Pres. Doc. 2669, 2670 (Oct. 28, 2000).

[5] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000, – AB 2002-7,* WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm.

In light of the international and domestic response, Congress partially repealed the CDSOA in 2006. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006) (App. 170a). The repeal did not affect duties collected on merchandise entering the country before October 1, 2007, which will continue to be distributed to domestic producers notwithstanding the partial repeal. *Id.* § 7601(b). As of October 2008, more than $1 billion in funds still subject to the CDSOA remained in Customs' special accounts awaiting distribution.[6]

B. SKF USA's Administrative Claim for CDSOA Funds

SKF USA is a domestic manufacturer of ball bearings. Since 1914, SKF USA has operated continuously in the United States, employing over 4,000 employees at its various facilities throughout the country. SKF USA is one of the largest U.S. producers of antifriction bearings.

In 1988, Commerce initiated an antidumping investigation of ball bearings on petition by the Torrington Company. As part of its material injury investigation, the ITC sent domestic producer questionnaires to 50 bearing manufacturers,

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[6] *See* U.S. Customs and Border Protection CDSOA Annual Report FY 2008, Section III, Clearing Account Balances as of 10/1/08, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_annual_rep/section3_ balances.ctt/section3_balances.pdf.

including SKF USA.[7] SKF USA responded to the ITC's questionnaires, submitting 242 pages of preliminary and final responses. App. 73a.

SKF USA did not, however, express "support" for the investigation. When asked in the ITC questionnaire for its position on the petition, SKF USA answered that it opposed the petition. App. 12a. Commerce and the ITC nevertheless determined that the domestic industry was materially injured by sales of imports at less than fair value and subsequently issued antidumping orders against ball bearings from certain subject countries.

On March 1, 2005, SKF USA asked the ITC to add it to the list of producers eligible to receive CDSOA distributions relating to ball bearings from Japan. The ITC denied the request because SKF USA "had indicated that it opposed the petition in its questionnaire response in the original investigation." App. 158a-159a. Customs later denied SKF USA's claim for distributions because it was not on the ITC's list of eligible producers. App. 156a-157a.

C. The Decisions Below

SKF USA then filed a civil action in the CIT, which has exclusive jurisdiction over cases involving antidumping duties and their administration and enforcement. 28 U.S.C. § 1581(i)(2), (4) (2006). SKF

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[7] SKF USA is a subsidiary of AB SKF, a Swedish corporation. As part of its injury determination, the ITC determined that SKF USA was part of the domestic industry. *See Torrington Co. v. United States*, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), *aff'd mem.*, 991 F.2d 809 (Fed. Cir. 1993).

USA challenged the denial of CDSOA distributions under the First Amendment and the equal protection component of the Fifth Amendment Due Process Clause. The CIT sustained SKF USA's challenge on equal protection grounds, pretermitting the First Amendment challenge. App. 129a-155a.[8] The government appealed under 28 U.S.C. § 1295(a)(5) (2006).

A divided panel of the Federal Circuit reversed. With respect to SKF USA's First Amendment challenge, the panel acknowledged that the statute explicitly restricts eligibility to "a petitioner or interested party in support of the petition." 19 U.S.C. § 1675c(b)(1)(A). Given this clear language, the majority rejected as "simply implausible" the government's argument that CDSOA distributions "are 'not based upon the viewpoint expressed' in antidumping proceedings." App. 30a.

The majority nevertheless declined to apply strict scrutiny review. It reasoned instead that the statute could be saved from invalidity by construing it in light of a statutory purpose expressly disclaimed by the government – "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." App. 33a. The majority applied the less rigorous scrutiny applicable to commercial speech, reasoning that commercial speech doctrine

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[8] Shortly before SKF USA's successful challenge in the CIT, another CIT decision invalidated the CDSOA on First Amendment grounds. *See P.S. Chez Sidney*, 442 F. Supp. 2d at 1359.

has been applied not only to speech "proposing a commercial transaction," but also "to regulation of other activities of a commercial nature." App. 39a. It reasoned that "[r]ewarding parties under the circumstances presented here is similar to commercially contracting with them to assist in the performance of a government function . . . ." App. 40a. The majority upheld the statute under this commercial speech standard.[9]

In dissent, Judge Linn criticized the "majority's undue focus" on statutory purpose in light of the viewpoint discrimination apparent on the statute's face. Judge Linn questioned the majority's use of statutory purpose "to shield the petition support clause from strict scrutiny under the First Amendment entirely." App. 63a. He criticized the majority for erroneously substituting a purpose expressly disclaimed by the government in lieu of the government's "actual, asserted interest." App. 70a. He concluded that the CDSOA effects a "viewpoint discriminatory restriction on political speech and petitioning activity that cannot survive strict scrutiny." App. 54a.

SKF USA filed a petition for rehearing en banc, which the court denied. Judge Linn again dissented, in an opinion joined by Judges Newman, Rader, and Moore. App. 103a-108a. The dissent criticized the panel's application of commercial speech doctrine.

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[9] The majority also rejected SKF USA's related equal protection challenge, applying rational basis review. App. 51a-52a.

"The most significant problem with this analysis is that it creates a whole new category of speech—speech in circumstances that are 'similar to' commercial speech—and it subjects that speech to much less rigorous scrutiny under the First Amendment than it would otherwise receive." App. 107a. "Opening up this kind of exception should not be done lightly . . . ." App. 108a. Noting that 41 cases challenging the CDSOA were currently stayed in the CIT, the dissent reasoned that "'[t]he impact of the panel's decision is far reaching.'" *Id.* (citation omitted). "This case," it concluded, "is simply too important to allow the majority's incorrect First Amendment analysis to stand." *Id.*

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision violates important First Amendment principles established by a consistent line of this Court's decisions prohibiting government viewpoint discrimination. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Speiser v. Randall*, 357 U.S. 513 (1958). In contravention to these decisions, it authorizes the federal government to withhold federal benefits solely on the basis of a speaker's public opposition to a proposed government course of action. It justifies this facial viewpoint discrimination on the basis of a contrived purpose nowhere found in the statute and expressly disclaimed by the government. And it applies the lesser scrutiny of the commercial speech doctrine to political speech concerning matters of important government policy.

The disagreement within the Federal Circuit on the issues in this case is reflective of broader conflicts among federal courts of appeals. The panel's application of less rigorous scrutiny is in conflict with decisions of the Sixth Circuit, which apply strict scrutiny to statutes that distribute government benefits on the basis of a speaker's support for proposed governmental action. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (1999), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002). The decision below also amplifies broader doctrinal conflicts on the appropriate use of congressional purpose in analyzing statutes that differentiate speech on their face and on the proper scope of commercial speech doctrine.

The Federal Circuit's decision has serious repercussions for the administration of this federal program and others. It significantly chills speech in a government investigation, "limit[ing] the ability of persons or entities to take a particular political position freely." *Lac Vieux*, 172 F.3d at 407. It thus distorts the debate in a forum where the candid exchange of views is critical to the proper enforcement of the law. And it does so with respect to speech "directed at the core of one of the most contentious issues now debated among nations . . . ." *P.S. Chez Sidney*, 442 F. Supp. 2d at 1350.

More than 40 cases involving dozens of different imported products hinge on the outcome of this case. As much as $1 billion remain to be distributed under the CDSOA, extending the discriminatory impact of the statute for years to come. More broadly, the Federal Circuit's decision authorizes the government

to reward favored speech on any number of other contentious public policy issues, in turn punishing those who disagree with its favored positions.

The Court should grant certiorari to resolve the conflicts and prevent the damage to fundamental liberties caused by the Federal Circuit's erroneous determination.

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

On its face, the CDSOA determines eligibility for federal funds based on the viewpoint expressed by an applicant on an important issue of public policy. If an otherwise eligible manufacturer failed to express "support" for the government's antidumping investigation of imports in its industry, the statute denies that manufacturer any part of the CDSOA funds. 19 U.S.C. § 1675c(a), (b)(1)(A). The Federal Circuit nevertheless declined to apply the strict scrutiny to which this Court subjects statutes that discriminate on the basis of viewpoint. *See, e.g., Rosenberger*, 515 U.S. at 829; *Simon & Schuster*, 502 U.S. at 116; *Speiser*, 357 U.S. at 529.

A fundamental tenet of the Free Speech Clause is that the government "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. "Discrimination against speech because of its message is presumed to be unconstitutional," and targeting "particular views taken by speakers on a subject" is an "all the more blatant" and impermissible form of discrimination.

Id. at 828, 829; *see Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642-43 (1994).[10] In justifying the CDSOA's viewpoint discrimination on the basis of more lenient scrutiny, the Federal Circuit opens the door to government engaging more frequently in this "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829.

The Federal Circuit's decision evinces doctrinal confusion on numerous aspects of this Court's First Amendment jurisprudence.

A. The Federal Circuit Erroneously Subjects Viewpoint Discriminatory Funding Statutes to Lesser Scrutiny than Statutes That Prohibit Speech

First, the panel decision draws an unsupported bright line between statutes that "prohibit particular speech" and statutes, like the CDSOA, that appropriate benefits on the basis of that speech. App. 28a. The panel conceded that "[s]tatutes that are prohibitory in nature are rarely sustained," *id.*, but concluded that this Court's "cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment." *Id.*

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[10] Even in non-public forums, where government is afforded the greatest latitude in regulating speech, the Court has consistently held that speech restrictions must remain viewpoint neutral. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Speech Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

This Court has never drawn such a line in reviewing viewpoint discriminatory statutes. The government offends the First Amendment not only when it prohibits particular forms of speech, but also "when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828.[11] Thus, this Court applies the same heightened scrutiny to statutes that deny benefits based on protected speech as it applies to statutes that prohibit such speech. *Turner*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Any other approach "would allow the government to 'produce a result which [it] could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser*, 357 U.S. at 526).[12]

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[11] *See also id.* at 834 (reaffirming "the requirement of viewpoint neutrality in the Government's provision of financial benefits"); *Simon & Schuster*, 502 U.S. at 115; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) ("conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms").

[12] The government may consider viewpoint in the distribution of monetary benefits only where that funding is provided to facilitate of *its own* speech. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991). The panel majority suggested without deciding that it "might also be possible" to view this as such a case, App. 40a n.29, but it strains credulity to suggest that antidumping proceedings are somehow a program of

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B. The Federal Circuit Justifies Facial Viewpoint Discrimination in Light of a Perceived Benign Statutory Purpose

Second, having placed to the side the greater weight of this Court's viewpoint discrimination jurisprudence, the Federal Circuit compounded its error by disregarding entirely the discrimination effected by "the very terms of" the CDSOA. *See Rosenberger*, 515 U.S. at 831. Notwithstanding the statute's plain language targeting "support" for government action, the Federal Circuit posited that it could save the CDSOA from strict scrutiny by conceiving a benign legislative purpose to justify the statute without reference to the content of speech. Its reasoning disregards this Court's teaching that the "purpose, or justification, of a regulation will often be evident on its face." *Turner*, 512 U.S. at 642.[13]

The court of appeals relied for its benign-justification reasoning on *Ward v. Rock Against Racism*, 491 U.S. 781 (1980). In that case, this Court observed that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified*

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government speech. If anything, antidumping proceedings are a forum for producers to express their *private* opinions to assist the government in making a fair determination of whether duties should be imposed. *See* discussion, *infra*, pp. 22-24.

[13] *See also Burson v. Freeman*, 504 U.S. 191, 207 (1992) (applying strict scrutiny where statute's terms "distinguish among types of speech"); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (subjecting to strict scrutiny speech ban "defined solely on the basis of the content of the suppressed speech").

without reference to the content of the regulated speech.'" *Id.* at 791 (emphasis in original) (citation omitted). The Federal Circuit, however, misconceived this "justified without reference" language. *Ward* did not involve any claim of facial statutory discrimination. The *Ward* Court looked to the asserted justification of the statute to *expand* the protections of the First Amendment. It examined statutory purpose only when faced with a claim that a *facially neutral* statute directed at non-communicative attributes of speech (*i.e.*, decibel levels) was a subterfuge for suppressing speech on the basis of content. *See id.* at 791-92. In those limited circumstances, a court might find that a statute's purpose establishes that the regulation is a pretext for content-based discrimination. *Id. Ward*'s justified-without-reference-to-speech analysis is generally applied only in cases involving facially neutral "time, place or manner" restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

This Court has "expressly rejected the argument," endorsed by the Federal Circuit, "that 'discriminatory treatment . . . is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (citation omitted). "[O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' . . . 'We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.'" *Simon & Schuster*, 502 U.S. at 117 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592

(1983)). Thus, "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases." *Turner*, 512 U.S. at 642. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id.* at 642-43; *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

Discovery Network, for instance, rejected a similar attempt to classify a statute that differentiated between categories of speech (newspapers and commercial handbilling) as content-neutral on the grounds that the *"justification* for the regulation is content neutral." 507 U.S. at 429 (emphasis in original). The Court found this argument "unpersuasive because the *very basis* for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id.* (emphasis added). The fact that there was no evidence that the city acted with "animus toward the ideas contained in respondents' publications" was irrelevant. *Id.* "Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.'" *Id.*[14]

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[14] In narrow circumstances inapplicable here, the Court has applied less rigorous scrutiny to a statute that targets the *secondary effects* of particular speech content. *See Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). *Renton* did not address a statute, like the CDSOA, that targets a particular viewpoint for disfavored treatment. Nor is their any assertion here that a manufacturer's speech opposing a governmental trade investigation carries with it any detrimental secondary

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It is "invariably the case [that] the government can frame the interest served by . . . [its] rules in essentially speech-neutral terms." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451 (D.C. Cir. 1985) (footnote omitted). By disregarding plainly discriminatory language in light of a putative purpose unrelated to speech, the Federal Circuit's decision opens the door to any manner of creative viewpoint discrimination, bounded only by the imagination of the authors of legislative committee reports and sympathetic judges.

Nevertheless, the Federal Circuit's misapplication of *Ward* highlights an area of doctrinal uncertainty for which some commentators have expressed the need for clarification.[15] This case presents the opportunity for this Court to make clear that in determining whether a statute is impermissibly viewpoint discriminatory, the plain language of the challenged statute is paramount.

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effects unrelated to its content. *See Discovery Network*, 507 U.S. at 430 (rejecting secondary effects argument relating to commercial handbill newsracks).

[15] *See, e.g.*, Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. Rev. 1, 55-57 (2007-08) (Court's focus on purpose to separate content-based and content-neutral speech restrictions is "misguided" and has led to "anomalous results"); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. Rev. 595, 620 (2002-03) ("problems that haunt the content-based/content neutral inquiry stem almost entirely from the Court's failure to adhere to the face of a government action as its controlling feature").

C. The Federal Circuit Adopts a Statutory Purpose Expressly Disclaimed by the Government

Third, the Federal Circuit invented its purported statutory purpose only after rejecting the government's proffered justification. This invention of legislative purpose conflicts with this Court's many decisions that base First Amendment review on the actual, asserted purpose for a statute. *See* App. 67a (Linn, J., dissenting) (citing, *e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000)).

The government defended the CDSOA below on the grounds that its "support" requirement was a surrogate for determining the manufacturers most injured and thus most deserving of monetary compensation. Both the majority and the dissent properly rejected this purpose as insufficient to justify the statute's viewpoint discrimination. App. 30a (finding government's injury justification "simply implausible"); *see also id.* at 82a-83a (Linn, J., dissenting).

Having rejected the government's proffered justification, the panel turned its attention to devising a better one. Under the majority's construction, "the purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." App. 32a-33a.[16]

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[16] The court of appeals justified its reconstruction of legislative purpose as necessary to avoid the constitutional

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In its First Amendment cases, this Court has never substituted its own judgment for that of the political branches on the purpose of a legislative enactment. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational"). Instead, the actual, "asserted governmental interest" is the focal point of the First Amendment inquiry. App. 70a (Linn, J., dissenting) (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). This is true even in cases subject to less rigorous First Amendment review. *See Thompson*, 535 U.S. at 373; *Ward*, 491 U.S. at 790 (examining city's asserted justification of guideline as "regulatory measure to limit and control noise").

Here, the purpose invented by the panel is found nowhere in the statute's congressional findings. See Pub. L. No. 106-387, § 1002 (App. 160a-161a). It was, in fact, expressly *disclaimed* by the government in defending the statute below. App. 65a-66a. Moreover, this "reward" purpose is entirely fictitious. Under the panel's construction, CDSOA distributions

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question. Avoidance, however, is "a tool for choosing between competing plausible interpretations of a *statutory text*, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). The doctrine does not allow a court "to ignore the government's asserted purpose and substitute our own when heightened First Amendment scrutiny applies." App. 70a (Linn, J., dissenting).

go only to those producers who actively assisted the government in its enforcement decision. The court defined "active assistance" as not merely expressing support for the petition but also providing substantive responses to the ITC's questionnaire. *See* App. 36a-37a n.26. But the panel's construction does not narrow the class of available recipients. Because responses to the ITC questionnaires are mandatory, *every* respondent provides substantive responses to the questionnaire. *See* App. 72a-73a (Linn, J., dissenting). Thus, the fulcrum of the majority's "reward" purpose remains the protected expression of the affected producer, *i.e.*, its response to the questionnaire's "support" question.

This reward justification also confuses the government's role in antidumping investigations. The government's objective in those investigations is not to impose antidumping duties in all cases but to make a fair determination of whether duties are warranted under the particular circumstances presented. *See* App. 55a (Linn, J., dissenting). To paraphrase a motto inscribed on the walls of the Department of Justice, the "United States wins its point whenever justice is done its citizens. . . ." *Brady v. Maryland*, 373 U.S. 83, 87 & n.2 (1963).

Consistent with this proposition, the government acknowledged that "petition supporters and petition opponents provide exactly the same assistance to the government in antidumping investigations." App. 72a. SKF USA's participation in the investigation here illustrates that point. It provided reams of data in response to the ITC questionnaire, presented legal briefing, expert witness testimony and even oral

argument. *See* App. 48a-49a; *id.* at 73a-74a The only difference between SKF USA and those domestic producers that qualified for CDSOA distributions is that SKF USA provided this assistance to substantiate its publicly expressed *opposition* to the investigation.

The disconnect between the Federal Circuit's "reward" justification and the actual role a questionnaire respondent plays in an antidumping investigation illustrates the danger that arises when a court substitutes its judgment on statutory purpose for that of the political branches. The creation of a hypothetical and fictitious justification is the hallmark of the loosest possible constitutional scrutiny and is wholly inappropriate in First Amendment review. This fundamental error in the panel's analysis warrants review by this Court.

D. The Federal Circuit Erroneously Applies Commercial Speech Doctrine to Protected Speech on Issues of Public Policy

Finally, the Federal Circuit's decision effects a breathtaking misapplication of this Court's commercial speech jurisprudence. The panel acknowledged that, as a form of petitioning the government on a matter of important public policy, "SKF's opposition to the antidumping petition here is protected First Amendment activity." App. 38a. Shunning strict scrutiny, the panel majority reasoned that "rewarding those who support government enforcement is at least constitutional if those provisions satisfy the standards governing commercial speech." App. 39a. It analogized the "rewarding" of speakers for support of an

antidumping petition to "commercially contracting with them to assist in the performance of a government function," and concluded that the application of intermediate scrutiny under the commercial speech doctrine "seems appropriate." App. 40a.

This Court has, at various times, used different formulations to articulate the standard for determining what constitutes commercial speech. Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *see also Bd. of Trustees S.U.N.Y. v. Fox*, 492 U.S. 469, 482 (1989). In *Central Hudson*, the Court articulated the standard as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561.

Whatever this Court's precise standard, SKF USA's opposition to the antidumping investigation in its industry bears no resemblance to less jealously protected commercial speech. The court of appeals applied a standard reserved for advertising and similar promotional speech to a corporation's protected petitioning of a government agency on a matter of significant public importance. This Court has long held, though, that the free discussion of governmental affairs is "indispensible to decision-making in a democracy" – a proposition that is "no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). By stretching the commercial speech doctrine to reach such core First Amendment speech, the court of

appeals seriously dilutes the protections that the First Amendment affords businesses, whether corporate or individual-owned, in the discussion of how our government should conduct its affairs.

As the *en banc* dissent noted, the consequences of the Federal Circuit's opinion "should not be understated." App. 107a. It authorizes the government to favor one voice over another on an important public policy issue regarding the government's own conduct. It allows the government to take refuge in the lesser scrutiny associated with commercial speech simply by paying people to express a particular viewpoint in support of governmental policies. The decision creates an enormous loophole in the First Amendment's prohibition of viewpoint discrimination that this Court should close.

II. THE FEDERAL CIRCUIT'S DECISION CREATES NUMEROUS CIRCUIT SPLITS

As a result of its exclusive jurisdiction over appeals from the CIT, the Federal Circuit is the only circuit court of appeals that can review the constitutionality of the Byrd Amendment's support requirement. *See* 28 U.S.C. § 1581(i)(4); 28 U.S.C. § 1295(a)(5). Especially given the constitutional issue presented, the rule applied by the Federal Circuit is therefore a matter of "special importance to the entire Nation" warranting certiorari. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

While the Federal Circuit's exclusive jurisdiction negates the possibility of a conflict among the circuits on the precise statute at issue here, its holding engenders several circuit splits among courts

of appeals deciding similar issues—both in its failure to apply strict scrutiny review and in its broad use of the commercial speech test. The Court should grant certiorari to address the doctrinal tension created in the courts of appeals by the Federal Circuit's decision.

A. The Federal Circuit's Analysis Conflicts with Other Circuits on the Appropriate Test for Viewpoint Discrimination

The Federal Circuit is not the first circuit to consider the constitutionality of a regulation rewarding applicants based on their public support for government action. As the dissent observed, the "closest analogous case in the regional circuits" is the Sixth Circuit's decision in *Lac Vieux*, 172 F.3d 397 (1998), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002). App. 92a. Contrary to the decision here, the Sixth Circuit ruled that a statute rewarding support for government action must survive strict scrutiny. 172 F.3d at 409-10. In conflict with the holding of the Federal Circuit, the Sixth Circuit invalidated a city ordinance that afforded preferential treatment to supporters of proposed government action. 276 F.3d at 880.

Lac Vieux involved a First Amendment challenge to state and local statutes that gave a "preference" in casino licensing to casino developers who "actively promot[ed] and significantly support[ed] a state initiative authorizing gambling." *Lac Vieux*, 172 F.3d at 401 (citation omitted). The laws were challenged by an Indian tribe that had not provided political or public relations support for the successful ballot initiative but was nonetheless interested in obtaining a gambling license. The tribe challenged

the statutes for impermissibly "awarding preferences to parties 'for their political support of a particular side of a controversial political issue.'" *Id.* at 402 (citation omitted).

In its review of the First Amendment challenge, the Sixth Circuit ruled that "the ordinance is content-based and is therefore subject to strict scrutiny." *Id.* at 409-10. It relied upon the plain statutory language for this conclusion. "It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment." *Id.* at 409.

The Sixth Circuit recognized the significance of the burden imposed by the support requirement. "The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech." *Id.* at 407. That "chilling effect" arises, the court reasoned, "because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue." *Id.* at 407-08. On appeal after remand, the court invalidated the statute, reasoning: "Barring governments from endorsing or punishing political activity, or the lack of it, is among the paramount functions of the First Amendment's Free Speech Clause." *Lac Vieux*, 276 F.3d at 880. The court found that the city was unable to meet its heavy burden of demonstrating that the statute is

narrowly tailored to a compelling governmental interest; thus, "the preference renders the ordinance invalid." *Id.*

A more analogous statutory scheme is difficult to imagine. Like the CDSOA, the *Lac Vieux* statutes awarded government benefits on the basis of an applicant's prior support for a government initiative. The laws granted "a preference to certain entities because those entities took a particular view on a political issue." 172 F.3d at 408. Like the CDSOA, they denied the same preference to those who either spoke out against the proposed government action or took no public position. Unlike the Federal Circuit, the Sixth Circuit found impermissible viewpoint discrimination on the face of the challenged statutes and did not seek to justify the laws on the basis of a reward rationale.

The Federal Circuit majority limited its discussion of *Lac Vieux* to a single footnote. It distinguished the decision on the ground that "[t]he ordinance at issue in *Lac Vieux* did not reward the achievement of enforcement of government policy through litigation, but instead involved 'political support' for legislative efforts." App. 43a-44a n.32. But its attempt to distinguish *Lac Vieux* only highlights the opinion's doctrinal conflict with the decision of another court of appeals that invalidated similar government efforts to regulate support of government policy in judicial proceedings. *See Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998).

In *Hoover*, the Fifth Circuit invalidated a state university policy that prohibited professors from testifying as expert witnesses in litigation against the state. *Id.* at 227. The court criticized the policy

because it "drew a distinction between state employee speakers based on the content of the employees' relative speech." *Id.* "The one who testifies as an expert witness or acts as a consultant on behalf of the State is protected. The one who testifies as an expert witness or acts as a consultant on behalf of those who oppose the state in litigation is punished." *Id.* The Fifth Circuit concluded that the state policy was an invalid content-based restriction on speech. *Id.*

Hoover belies any notion that the "achievement of the enforcement of government policy through litigation" transcends political support for the government ballot initiative in *Lac Vieux*. That *Lac Vieux* involved "'political support' for legislative efforts" is of no significance since the "'[t]he free discussion of governmental affairs' protected by the First Amendment encompasses more than merely campaigning." App. 93a (Linn. J., dissenting) (citation omitted). The CDSOA expressly ties eligibility to the applicant's public expression of support for the investigation. It therefore requires a company's "political support" for the government's action, no less than the gambling ordinance at issue in *Lac Vieux*. *Id.*

The conflict between the Sixth and Federal Circuit is illustrated more broadly by the disagreement among the lower courts on the role of governmental purpose in First Amendment review. In contrast to the panel majority's heavy reliance on *Ward* here, other courts of appeals have declined to examine purpose when the statutory text is clearly content based. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 n.8 (11th Cir. 2005).

According to the Eleventh Circuit, this Court's more recent case law "has receded from [the *Ward*] formulation, returning to its focus on the law's own terms, rather than its justification . . . ." *Id.* at 1259 (citing *Discovery Network*, 507 U.S. at 429).

Similarly, in *ACLU v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), the Ninth Circuit reasoned that "we are not required to find a content-based purpose in order to hold that a regulation is content based." *Id.* at 793. Unlike the Federal Circuit, that court will find a statute to be content based (and subject to strict scrutiny) "if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face." *Id.*; *see also State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006) (content-based nature of statute "is no less so because" of state's intent).

The Court should grant review to clarify the doctrinal confusion in the lower courts evinced by the Federal Circuit's decision.

B. The Federal Circuit's Analysis Conflicts with Other Circuits' Application of Commercial Speech Doctrine

The Federal Circuit's application of the *Central Hudson* standard for commercial speech highlights another area of doctrinal disarray in the courts of appeals. The circuits are deeply divided over when to apply *Central Hudson*'s commercial speech standard. Several circuits apply the narrower commercial speech definition articulated by this Court as speech that does no more than propose a commercial transaction. *See Mattel, Inc. v. MCA*

Records, Inc., 296 F.3d 894, 906 (9th Cir. 2002); *CFTC v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000); *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999). Others have adopted the broader *Central Hudson* "economic interests" standard, which subjects more speech to a lesser degree of First Amendment protection. *See IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54-55 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009); *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000); *Hoover*, 164 F.3d at 225.

The majority's decision below goes well beyond any standard sanctioned by this Court or even other circuits. As the judges dissenting from the *en banc* denial explained, the majority applies less rigorous commercial speech review in "circumstances that are sufficiently similar to commercial speech (but are not actually commercial speech), such that the commercial speech test 'seems appropriate.'" App. 108a. This is a standardless standard. If allowed to stand, it will further dilute the protection available to commercial actors' speech on critical matters of public policy.

The Federal Circuit opinion thus presents an opportunity to consider issues left open when this Court dismissed as improvidently granted the writ in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam), a case involving the appropriate standard to apply to a commercial actor's speech addressing a matter of public controversy. This case presents none of the procedural infirmities that may have led the Court to dismiss the writ in *Nike*. The Court should use this occasion to clarify this important area of the law and

to correct the Federal Circuit's misapplication of commercial speech law to the CDSOA.

III. THE FEDERAL CIRCUIT'S DECISION PRESENTS A RECURRING PROBLEM OF CONSTITUTIONAL SIGNIFICANCE

The Federal Circuit's decision has dramatic ramifications. Customs currently holds as much as $1 billion in duties subject to distribution under the CDSOA. *See supra* note 6. Over forty cases, involving products as varied as crawfish and furniture, are currently stayed before the CIT and the Federal Circuit pending final resolution of this case. App. 108a; *see United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365 & n.2 (1998) (certiorari granted where "[n]umerous cases" over which CIT exercised exclusive jurisdiction regarding constitutionality of federal statute "are currently pending in the [CIT] . . . ."). SKF USA, in particular, continues to suffer significant competitive injury from an unconstitutional statutory scheme in which its principal domestic competitors receive 38% of the total CDSOA funds distributed.[17]

The chilling effect of the CDSOA cannot be gainsaid. Any statute that awards or withholds benefits on the basis of an applicant's speech poses a significant risk of self-censorship. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988). In this context, the effect of that self-censorship is to

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[17] Timken U.S. Corp., its subsidiary MPB Corporation, and the Torrington Company (acquired by Timken in 2003) received approximately $395 million in CDSOA distributions between 2001 and 2004. *GAO Report* at 29 & n.39.

substantially skew the debate on an important matter of public policy and international relations—whether the government should impose duties on imported foreign goods. This Court has guarded against statutory schemes that "distort [the] usual functioning" of the legal process by favoring the expression of one viewpoint over another in legal proceedings. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001). Such viewpoint favoritism "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster*, 502 U.S. at 116.

This specter is not hypothetical. The WTO panel noted that a domestic producer had "'changed its mind'" concerning an antidumping petition by deciding to express support for that petition "in order to remain eligible for possible offset payment subsidies."[18] One producer has explained that the CDSOA "likely skews the information obtained by the ITC, as domestic producers that may have independent reasons for not supporting the imposition of antidumping or countervailing duties no longer communicate those views for fear of losing out on a share of the duties should they ultimately be imposed."[19] Indeed, the GAO found evidence that,

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[18] *See* Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R ¶ 7.45 (Sept. 16, 2002) ("*WTO Panel Report*"), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm.

[19] *See* Letter from Wieland Metals, Inc. to Congressman E. Clay Shaw at 2 (Sept. 2, 2005), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=3700; *see also WTO Panel Report* ¶ 7.45 ("producers that

(Continued ...)

after enactment of the statute, some industry associations "reached out broadly to ensure producers were aware of the need to communicate support to the ITC." *GAO Report* at 11.

The partial repeal of the CDSOA does nothing to diminish the importance of the question presented here. Duties collected on merchandise that entered the United States before October 1, 2007, will be distributed under the program for years to come. *See* Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers: Notice, 74 Fed. Reg. 25,814, 25,814 (May 29, 2009) ("[T]he full impact of the CDSOA repeal on amounts available for distribution may be delayed for several years" and "the distribution process will continue for an undetermined period . . . ."). The $1 billion dollars held in Customs clearing accounts will continue to be distributed each fiscal year to domestic producers until the accounts are depleted. The domestic producers entitled to distributions may vary annually depending on which producers submit proper certifications to Customs. Domestic producers that did not express support for a petition, however, will be excluded from distributions. It is this distribution process that burdens the First

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might not normally have supported an application may well be induced to as a result of the CDSOA, given the potential for offset payment subsidies, especially since they would otherwise render themselves less competitive vis-à-vis other domestic producers that do receive offset payment subsidies").

Amendment rights of dissenting producers, and this process is ongoing.[20]

Moreover, the partial repeal of the statute does nothing to remove its oppressive shadow from ongoing trade proceedings. Notwithstanding the controversy surrounding the original Byrd Amendment, reports have indicated legislative support for its re-enactment.[21] The mere possibility that Congress could reenact the statute weighs heavily in today's trade investigations, since producers do not know if their failure to express support for a petition in response to today's ITC questionnaire will "later adversely affect their ability to receive CDSOA disbursements." *See GAO Report* at 11. This uncertainty itself restricts and chills free speech. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (explaining chilling effect of potential prosecution). Only a ruling by this Court invalidating the statute can lift that chill.

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[20] On prior occasions, the Court has granted certiorari to resolve issues arising under repealed statutes, including the proper distribution of the funds under a partially repealed statute. *See Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 372 n.2 (1974) (case not mooted "for there remains the issue of substantial refunds of taxes collected under" repealed ordinance); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 n.1 (1996) (reviewing repealed statute where repeal not retroactive); *see also Fulton Corp. v. Faulkner*, 515 U.S. 1156 (1995) (mem.) (denying motion to dismiss *Fulton* writ as improvidently granted).

[21] *See, e.g., Byrd's Bad Idea Is Back*, Wall St. J. Online Aug. 11, 2008, *available at* http://online.wsj.com/article/SB121841227101628383.html.

Finally, the importance of the question presented is not confined to the trade context. The Federal Circuit's decision has implications well beyond the confines of antidumping disputes, since a statutory support requirement implicates the very core of protected speech: speech about government affairs. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("speech critical of the exercise of the State's power lies at the very center of the First Amendment").

"[A] function of free speech under our system of government is to invite dispute." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Statutes that trigger government benefits based on "support" for government action do precisely the opposite. They incentivize speech in favor of government policy and penalize any opposition. It requires little imagination to see how damaging such statutes might be. Under the court of appeals' reasoning, Congress might use monetary payments to encourage support for – and discourage dissent from – a wide range of government policies and decisions. For example, the decision would permit Congress to deny bailout funds to any automobile manufacturer that criticized government trade policies or to provide healthcare subsidies only to those citizens who spoke in favor of national healthcare reform.

Congress faces strong political pressures to penalize those who disagree with federal policies. In fact, at various times in our history, Congress has enacted statutes to discourage criticism of the government and its policies. The Sedition Act of 1918 famously criminalized speech deemed "scurrilous" or "abusive" to the government or its

military forces. Pub. L. No. 150, 40 Stat. 553 (1918). Similarly, in *Schacht v. United States*, 398 U.S. 58 (1970), the Court struck down a statute making it a crime for an actor to wear a military uniform in a theatric production if the production discredited the military. *Id.* at 59-60. Short of such prohibitions, there is nothing more tempting for government than to limit its largesse to those who support its policies.

This Court is unlikely to have a better vehicle for reaffirming fundamental viewpoint neutrality principles, for dispelling the lower court's confusion on the use of statutory purpose in the constitutional analysis and for ensuring that future legislative action conforms to proper constitutional standards. It should grant certiorari to provide that guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2009

APPENDIX

APPENDIX A — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED FEBRUARY 19, 2009

UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

Nos. 2008-1005, 2008-1006, 2008-1007, 2008-1008

SKF USA, INC.,

Plaintiff-Cross Appellant,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendant-Appellant,

and

United States International Trade Commission,

Defendant-Appellant,

and

Timken U.S. Corporation,

Defendant-Appellant,

and

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United States, Robert C. Bonner, Commissioner, United States Customs and Border Protection, and Daniel R. Pearson, Chairman, United States International Trade Commission,

Defendants.

Feb. 19, 2009

Before LINN and DYK, Circuit Judges, and STEARNS, District Judge.*

Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge LINN.

DYK, Circuit Judge.

The Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment") provides for the distribution of antidumping duties collected by the United States to eligible "affected domestic producers" of the dumped goods. 19 U.S.C. § 1675c(a) (2000). An "affected domestic producer" must be "a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." *Id.* § 1675c(b)(1)(A).

In 2005 the United States International Trade Commission ("ITC") and United States Customs and

* Honorable Richard G. Stearns, District Judge, United States District Court for the District of Massachusetts, sitting by designation.

Appendix A

Border Protection ("Customs") denied SKF USA's ("SKF's") request for Byrd Amendment distributions, on the ground that SKF was not an eligible "affected domestic producer" because it had not been a petitioner and had not supported the petition resulting in the relevant antidumping duty order. SKF challenged this determination and the constitutionality of the Byrd Amendment in the Court of International Trade on First Amendment and equal protection grounds. The Court of International Trade held that the requirement that a claimant be a petitioner or "support" an antidumping petition violated "the Equal Protection guarantees under the Fifth Amendment to the Constitution," and that the statutory language imposing this requirement was severable from the Byrd Amendment, making SKF potentially eligible to receive distributions. *SKF USA Inc. v. United States*, 451 F.Supp.2d 1355, 1366-67 (Ct. Int'l Trade 2006).

On remand, the ITC and Customs determined that under the Court of International Trade's decision, SKF was eligible for Byrd Amendment distributions of approximately $1.4 million and that SKF's claims for additional distributions (made for the first time on remand) were not timely. The Court of International Trade upheld these remand determinations. *See SKF USA Inc. v. United States*, 502 F.Supp.2d 1325, 1328, 1334 (Ct. Int'l Trade 2007). We reverse, because we conclude that the Byrd Amendment is constitutional.

Appendix A

BACKGROUND

I

The trade laws of the United States further the government's policy against the dumping of goods. The statutory definition of "dumping" is "the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34).

The Department of Commerce ("Commerce") calculates the "normal value" of the imported goods and compares that price with the price at which the imported goods are sold in the United States. *See id.* §§ 1677(1), 1677b(a). If the sales price is below the normal value, dumping has occurred. In turn, the ITC determines whether such dumping has "materially injured" or threatened material injury to a United States industry. *Id.* § 1673d(b)(1).

The government almost always relies on petitioners to initiate antidumping proceedings. The regulations specifically state that "[t]he Secretary [of Commerce] normally initiates antidumping . . . duty investigations based on petitions filed by a domestic interested party." 19 C.F.R. § 351.202(a). A petition must satisfy certain requirements and be filed "by or on behalf of the industry." 19 U.S.C. § 1673a(c)(1)(A).[1] After the filing of

1. This requires that "the domestic producers or workers who support the petition account for at least 25 percent of the

(Cont'd)

a petition, Commerce sends questionnaires to foreign producers and exporters to determine whether dumping has occurred. If there is a question as to the adequacy of the petition, Commerce sends questionnaires to domestic industry members as well. The ITC sends questionnaires to domestic producers, requesting production and other data in order to assist it in determining whether the dumping alleged in the petition has materially injured a domestic industry or has threatened it with material injury. At least since 1988, the ITC questionnaires have asked whether the recipient of the questionnaire supported, opposed, or took no position on the petition. Commerce and the ITC rely heavily on information gleaned from responses to their questionnaires.

If Commerce makes a final determination that "the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value,"[2] and if the ITC makes a final determination that a U.S. industry has suffered or is threatened with material injury,

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total production of the domestic like product" and that "the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition." 19 U.S.C. § 1673a(c)(4)(A).

2. "Normal value" and "fair value" are for the most part synonymous. Commerce regulations state that " '[f]air value' is a term used during an antidumping investigation, and is an estimate of normal value." 19 C.F.R. § 351.102(b)(22).

Commerce issues an antidumping duty order. *Id.* § 1673d(a)(1), (b)(1), (c)(2); *see also* 19 C.F.R. pt. 207; 19 C.F.R. §§ 351.205(a), 351.210(a). Such an order imposes a duty "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. Such duties are collected by Customs.

The Byrd Amendment, enacted in 2000, requires that antidumping duties collected by Customs be distributed to "affected domestic producers" for "qualifying expenditures."[3] Continued Dumping and Subsidy Offset

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3. The relevant portion of the Byrd Amendment, 19 U.S.C. § 1675c, reads:

> (b) Definitions
>
> As used in this section:
>
> (1) Affected domestic producer
>
> The term "affected domestic producer" means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—
>
> (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.
>
> Companies, businesses, or persons that have ceased the production of the product covered by the order

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(Cont'd)

or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.

. . . .

(4) Qualifying expenditure

The term "qualifying expenditure" means an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order in any of the following categories:

(A) Manufacturing facilities.

(B) Equipment.

(C) Research and development.

(D) Personnel training.

(E) Acquisition of technology.

(F) Health care benefits to employees paid for by the employer.

(G) Pension benefits to employees paid for by the employer.

(H) Environmental equipment, training, or technology.

(I) Acquisition of raw materials and other inputs.

(J) Working capital or other funds needed to maintain production.

. . . .

Appendix A

Act of 2000, Pub.L. No. 106-387, § 1001-1003, 114 Stat. 1549, 1549A-72-75 (codified at 19 U.S.C. § 1675c (2000)), *repealed by* Deficit Reduction Act of 2005, Pub.L. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective October 1, 2007).[4] Under the Byrd Amendment, in order to qualify

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> (d) Parties eligible for distribution of antidumping and countervailing duties assessed
>
> (1) List of affected domestic producers
>
> The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.

4. The Byrd Amendment was repealed in February 2006, but the repeal was not retroactive. The repeal provisions stated that "[a]ll duties on entries of goods made and filed before October 1, 2007 . . . shall be distributed as if [the Byrd Amendment] had not been repealed." Deficit Reduction Act of 2005, Pub.L. 109-171, § 7601(b), 120 Stat. 4, 154 (Feb. 8, 2006).

for distributions, a party must have been "a petitioner or interested party in support of the petition," and an interested party must have indicated that it supported a particular antidumping petition "by letter or through questionnaire response" to the ITC.[5] 19 U.S.C. § 1675c(b)(1)(A), (d)(1).

II

On March 31, 1988, the Torrington Company ("Torrington"), a United States producer of antifriction bearings, filed a petition with Commerce and the ITC requesting the imposition of antidumping duties on imported antifriction bearings. *See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France*, 53 Fed.Reg. 15,074 (Dep't of Commerce Apr. 27, 1988) (initiation of antidumping duty investigation). The petition alleged that imported bearings were being sold or were likely to be sold at less than fair value and that these imports materially injured or threatened to materially injure a United States industry. The petition also alleged that imported bearings were being sold at dumping margins ranging from 1% to 355%. *See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 53 Fed.Reg. 15,073

5. The Byrd Amendment requires the ITC to prepare a "list of affected domestic producers," defined as "a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1).

(Dep't of Commerce Apr. 27, 1988) (initiation of antidumping duty investigation); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from Japan*, 53 Fed.Reg. 15,076 (Dep't of Commerce Apr. 27, 1988) (initiation of antidumping duty investigation). The petition was over 200 pages in length and included scores of pages of sales data collected from several countries, product descriptions and comparisons, detailed analysis of the U.S. antifriction bearing industry, and extensive proprietary financial data.

In response to the petition, Commerce and the ITC initiated antidumping duty investigations. *See, e.g.*, *Antifriction Bearings from France*, 53 Fed.Reg. at 15,074. Commerce sent questionnaires to foreign manufacturers,[6] and to domestic industry members as well "[i]n order to determine whether a major proponent of the domestic industry opposes the petition." *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from Italy*, 53 Fed.Reg. 45,361, 45,362 (Dep't of Commerce Nov. 9, 1988) (prelim.

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6. The foreign manufacturers included, for example, SKF's affiliated companies such as SKF UK Limited in the United Kingdom and Aktiebolaget SKF in Sweden. *See, e.g.*, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the United Kingdom*, 53 Fed.Reg. 45,312 (Dep't of Commerce Nov. 9, 1988) (prelim. determinations of sales at less than fair value); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from Sweden*, 53 Fed.Reg. 45,319 (Dep't of Commerce Nov. 9, 1988) (prelim. determinations of sales at less than fair value).

determinations of sales at less than fair value). Commerce subsequently determined that the majority of the domestic antifriction bearing industry supported the petition.[7]

Before making its final dumping determinations, Commerce also held several public hearings in February 1989, in which Torrington and other interested parties filed pre- and post-hearing briefs.[8] Each hearing examined imports from a different country. Commerce ultimately determined that imported antifriction bearings were being or were likely to be sold at less than fair value. *See, e.g., Antifriction Bearings (Other*

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7. *See, e.g., Antifriction Bearings (Other than Spherical Plain and Tapered Roller Bearings) and Parts Thereof from Italy and Spherical Plain Bearings and Parts Thereof, from Italy*, 54 Fed.Reg. 19,096, 19,097 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than and not less than fair value) (determining that petitioner had standing).

8. *See, e.g., Antifriction Bearings (Other than Spherical Plain Bearings and Tapered Roller Bearings) and Parts Thereof from the United Kingdom and Spherical Plain Bearings Parts Thereof from the United Kingdom*, 54 Fed.Reg. 19,120, 19,121 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than and not less than fair value) ("A public hearing was held on February 14, 1989."); *Antifriction Bearings (Other than Needle Roller Bearings, Spherical Plain Bearings, and Tapered Roller Bearings) and Parts Thereof from Sweden and Needle Roller Bearings and Spherical Plain Bearings, and Parts Thereof, from Sweden*, 54 Fed.Reg. 19,114 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than and not less than fair value) ("A public hearing was held on February 9, 1989.").

than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed.Reg. 18,992 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than fair value).

As part of its own investigation of the petition's allegations, the ITC sent detailed questionnaires to domestic ball bearing producers, seeking sales, employment, financial, and other data to help the ITC determine whether the domestic antifriction bearing industry had been materially injured (or threatened with material injury) by dumping. Eventually seven domestic companies, in addition to Torrington, supported the antidumping petition. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 73 Fed.Reg. 31,196, 31,220-21 (U.S. Customs and Border Protection May 30, 2008) (notice of intent to distribute) (listing eight companies as affected domestic producers eligible for Byrd Amendment distributions of antifriction bearing antidumping duties). The questionnaire responses of these petition supporters were hundreds of pages long, and several of the supporters prepared responses exceeding 300 pages. The supporters supplied voluminous data in response to the ITC's questionnaires, including extensive price and shipment data, product specifications, customer lists, internal company reports, descriptions of competitors, and detailed market analyses. Since it was a domestic producer, SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition.

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During its investigation of the petition's allegations, the ITC held two proceedings. On April 21, 1988, the ITC held a conference at which "all persons who requested the opportunity were permitted to appear in person or by counsel." *See* U.S. Int'l Trade Comm'n, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom: Preliminary Determinations*, at 3, Publication 2083 (May 1988). The ITC's report indicates that Torrington, the petitioner, appeared at the conference through counsel, assisted in the investigation, and submitted a post-conference brief providing over 120 pages of arguments, rebuttal, and analysis of the issues raised at the conference. *See id.* at A-62 n. 1 ("The petitioner . . . identified about 20 specific bearing products for which it reportedly encounters significant import competition. . . . With the help of the petitioner, the [ITC] staff selected 6 of these products to request pricing data.").

The ITC subsequently made a preliminary determination that there was a "reasonable indication that an industry in the United States is materially injured by reason of imports . . . of antifriction bearings." *Id.* at 1-2. On March 30, 1989, the ITC held a public hearing in connection with its final antidumping determination, where again "all persons who requested the opportunity were permitted to appear in person or by counsel." U.S. Int'l Trade Comm'n, *Antifriction Bearings (Other than Tapered Roller Bearings) and*

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Parts Thereof from the Federal Republic Of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom: Final Determinations, at 6, Publication 2185 (May 1989). Petitioner Torrington participated in this hearing by submitting pre-hearing and post-hearing briefs, as well as by providing economic testimony during the hearing on March 30, 1989. Petitioner Torrington's pre-hearing brief was over 200 pages long, and the brief proposed findings of fact and provided detailed analyses of the data provided in responses to the ITC's questionnaires. Much of the ITC's preliminary and final determination reports were devoted to analysis of petitioner Torrington's arguments. The ITC's final determination was that the "industry in the United States is materially injured by reason of imports [of antifriction bearings] . . . which have been found by the Department of Commerce to be [dumped]." *Id.* at 2.

After the ITC's final material injury determination, Commerce issued antidumping duty orders against antifriction bearings imported from several countries, including Japan. These orders covered countries where SKF's affiliated companies manufactured antifriction bearings that later were sold in the U.S. for less than fair value. SKF's affiliated companies thus were subject to duties. *See, e.g., Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof from Sweden*, 54 Fed.Reg. 20,907 (Dep't of Commerce May 15, 1989) (antidumping duty orders).

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III

This case presents no questions concerning the existence of dumping, material injury, or the appropriate antidumping duty rate. Rather, the issue is the constitutionality of the Byrd Amendment. As noted earlier, the Byrd Amendment requires the duties collected under an antidumping duty order to be shared with the petitioner and other "affected domestic producers" that supported the corresponding antidumping petition. 19 U.S.C. § 1675c(a), (b)(1). The Byrd Amendment requires the ITC to prepare a list of the affected domestic producers that petitioned for or supported each existing antidumping duty order, and directs Customs to pay qualifying producers a pro rata share of the collected antidumping duties each year to the extent of their qualifying expenditures. *See id.* § 1675c(d).[9]

On December 29, 2000, the ITC sent Customs the list of petitioners and petition supporters for each antidumping duty order in effect on January 1, 1999, as

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9. Producers who did not appear on the ITC's original list of an antidumping duty order's affected domestic producers can join the list under limited circumstances, such as by acquiring a company that was on the original list or by waiving the confidentiality of their support of the original petition. *See* 19 C.F.R. § 159.61(b)(1)(i); *Cathedral Candle v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1358-59 (Fed.Cir.2005) (noting that producers were added to a Byrd Amendment distribution list after waiving the confidentiality of their support for the original antidumping petition).

required under § 1675c(d)(1) of the Byrd Amendment. In August 2001, Customs published a notice of intent to distribute fiscal year 2001 Byrd Amendment funds that included the current list of these eligible affected domestic producers and invited them to file certifications to obtain distributions. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed.Reg. 40,782 (U.S. Customs and Border Protection Aug. 3, 2001). SKF did not appear on the list and did not request to be added to the list. In July 2002, Customs published a similar notice and list for distributions of fiscal year 2002 Byrd Amendment funds. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed.Reg. 44,722 (U.S. Customs and Border Protection July 3, 2002). SKF did not appear on or challenge this list. In July 2003, Customs published the notice and eligibility list for distributions of fiscal year 2003 Byrd Amendment funds. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 68 Fed.Reg. 41,597 (U.S. Customs and Border Protection July 14, 2003). Again, SKF did not appear on or challenge this list.

On March 1, 2005, for the first time, SKF asked the ITC to add SKF to its list of affected domestic producers under the antidumping duty order covering antifriction bearings from Japan.[10] The ITC denied this request on

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10. Since that time, SKF has claimed that it is entitled to 2004 distributions. On September 29, 2006, SKF filed a (Cont'd)

April 20, 2005, explaining that the Byrd Amendment "allows for adding only those potentially eligible producers that indicated support of the petition by letter or through questionnaire response during the original investigation." J.A. 66. The list of affected domestic producers under the Byrd Amendment for fiscal year 2005 was later published in the Federal Register, and SKF was not included. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed.Reg. 31,566 (U.S. Customs and Border Protection June 1, 2005). On July 13, 2005, SKF submitted a certification to Customs requesting Byrd Amendment distributions for fiscal year 2005. On July 15, 2005, Customs denied SKF's request because SKF did not appear on the ITC's list of affected domestic producers.

On October 3, 2005, SKF filed a complaint in the U.S. Court of International Trade, alleging that the Byrd Amendment and the determinations by the ITC and Customs that SKF did not qualify for 2005 Byrd Amendment distributions violated the First Amendment and equal protection guarantees of the U.S. Constitution. SKF subsequently moved for summary

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complaint against Customs and the ITC in the Court of International Trade seeking 2004 Byrd Amendment distributions. Compl., Court No. 06-00328 (Ct. Int'l Trade September 29, 2004) (later consolidated into Consol. Court No. 06-00290). The government urges this claim is untimely. SKF also is seeking 2006 distributions. Compl., Court No. 07-000035 (Ct. Int'l Trade February 5, 2007).

judgment on the agency record. SKF challenged the distribution of duties collected pursuant to the antidumping orders covering ball bearings from several countries, or, in the alternative, of only the duties collected pursuant to the antidumping order covering ball bearings from Japan.

SKF argued that the Byrd Amendment violates the Constitution's equal protection guarantees because, in light of the compensatory purpose of the Byrd Amendment, there is no rational basis for distributing antidumping duties only to domestic producers who supported an antidumping petition, and excluding similarly situated domestic producers who opposed or took no position on a petition. SKF also argued that the Byrd Amendment violates the First Amendment because it discriminates based on the viewpoint expressed by the party seeking to share in the distribution of antidumping duties.

The ITC and Customs ("the government"), supported by Timken U.S. Corporation ("Timken," the successor to petitioner Torrington),[11] urged that the Byrd Amendment was constitutional under both the First Amendment and equal protection. The government asserted that the Byrd Amendment "identifies a group of beneficiaries that are entitled to compensation for unfair trade practices" and therefore

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11. When Timken acquired Torrington in 2003, Timken became an affected domestic producer eligible to receive antifriction bearing Byrd Amendment distributions. *See SKF USA Inc.*, 451 F.Supp.2d at 1363.

had a rational basis. Def.'s Resp. to Pl.'s Mot. J. Upon Agency R. 27. The government also asserted that the Byrd Amendment did not unconstitutionally restrict speech. Timken belatedly raised a statute of limitations defense, and the Court of International Trade declined to allow Timken to amend its answer to raise this issue. *See SKF USA Inc. v. United States*, No. 05-00542 (Ct. Int'l Trade July 14, 2006) (Order).

On the merits, the Court of International Trade held that the Byrd Amendment's restriction of distributions to antidumping petition supporters violated the Constitution's equal protection guarantees, applied to the federal government through the Fifth Amendment. *See SKF USA Inc.*, 451 F.Supp.2d at 1366. The court found that because the antidumping laws are designed to benefit entire industries rather than individual companies, and because dumping similarly injures all members of a domestic industry, parties who participate in antidumping investigations are similarly situated whether they support or oppose the antidumping petition being investigated. The court could not "discern a reasonable correlation between an entity's decision to support a petition and the gravity of the entity's injury." *Id.* at 1362. Applying rational basis review, the Court of International Trade concluded that treating supporters and opposers of antidumping petitions differently was "not rationally connected to any legitimate objective" and thus that the Byrd Amendment unconstitutionally denied equal protection to SKF. *Id.* at 1362-63.

The court also held that the petition support requirement was severable from § 1675c(b)(1) of the Byrd Amendment. The effect was to replace the words "in support of the petition" with the words "in a petition" in § 1675c(b)(1)(A), and thus to define an "affected domestic producer" as "a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." *Id.* at 1365.

The Court of International Trade remanded the case to Customs and the ITC "to review their decisions denying SKF [Byrd Amendment] disbursements." *Id.* at 1367. Pursuant to the remand, Customs and the ITC determined that SKF was eligible to receive over $1.4 million in 2005 Byrd Amendment distributions under the antidumping duty order covering antifriction bearings from Japan. On review of these remand determinations, SKF argued that it was entitled to additional 2005 distributions, including distributions from antidumping duty orders involving antifriction bearings imported from additional countries. The Court of International Trade held that Customs and the ITC had complied with the remand. The court also held that SKF's certifications requesting additional 2005 distributions were untimely, because 19 C.F.R. § 159.63(a) requires certifications to be filed within sixty days of Customs' notice of intent to distribute Byrd Amendment funds for a particular fiscal year, and SKF's additional certifications were filed more than a year after Customs' July 2005 notice. *See SKF USA Inc.*, 502 F.Supp.2d at 1334.

Appendix A

The parties timely appealed and cross-appealed to this court. The government and Timken appeal the Court of International Trade's decision that SKF is eligible to receive Byrd Amendment distributions, and SKF cross-appeals the Court of International Trade's decision that SKF did not timely file its amended certification requesting additional 2005 Byrd Amendment distributions.

DISCUSSION

I

We first address whether the Court of International Trade had jurisdiction to hear SKF's claims. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . ." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)).

Under 28 U.S.C. § 1581(i), "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States" arising from "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" and their "administration and enforcement." However, an action under 28 U.S.C. § 2636(i) is "barred unless commenced in accordance with the rules of the court within two years after the cause

of action first accrues." The government and Timken both argue that SKF's challenge was untimely but on different theories. The government asserts that SKF's cause of action accrued either in December 2000 when the ITC sent to Customs the list of affected domestic producers, or in August 2001 when Customs published the list of affected domestic producers. Timken, in contrast, contends that SKF's cause of action accrued either when the Byrd Amendment was enacted on October 28, 2000, or in August 2001 when the ITC's list of affected domestic producers was published.[12]

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12. The parties devote considerable attention to debating whether SKF's cause of action falls under the continuing claim doctrine, which recognizes that under some circumstances a new cause of action accrues each time a periodic payment is denied, even though some antecedent event determined the right to the payment. *See, e.g., Hatter v. United States*, 203 F.3d 795, 797-98, 800 (Fed.Cir.2000) (en banc), *aff'd in part, rev'd in part* 532 U.S. 557, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001) (holding that where pursuant to statute taxes were withheld from judicial paychecks, a separate cause of action accrued with each individual paycheck under the continuing claim doctrine); *Brown Park Estates—Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1455-58 (Fed.Cir.1997) (holding that a claim was untimely because the cause of action accrued when the government administratively made an allegedly improper rent adjustment, and that later payments based on the earlier adjustment did not create separate causes of action under the continuing claim doctrine). The continuing claim cases are not, however, concerned with the question here—namely, whether a claim can accrue before the amount of the recovery can be calculated.

SKF argues that the statute of limitations defense has been waived because it was not timely raised in the Court of International Trade.[13] The ITC and Timken argue that the statute of limitations is jurisdictional rather than an affirmative defense and thus can be raised for the first time on review.

Recently in John R. Sand & Gravel Co. v. United States, the Supreme Court addressed 28 U.S.C. § 2501, the statute of limitations for bringing claims in the Court of Federal Claims. __ U.S. __, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). The Supreme Court held that because § 2501 is jurisdictional, it requires "sua sponte consideration" by courts even when a party waives the issue of timeliness. *Id.* at 752. In holding § 2501 to be jurisdictional, the Supreme Court distinguished between statutes of limitations that are affirmative defenses and those that are jurisdictional, describing jurisdictional statutes of limitations as "seek[ing] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal." *Id.* at 753.

We assume, but do not decide, that the statute of limitations in § 2636(i) is jurisdictional under *John R.*

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13. Rule 8(d) of the Rules of the Court of International Trade requires a party to raise any statute of limitations defense in its answer. *See Ct. Int'l Trade R.* 8(d) (2002) (amended November 25, 2008; effective January 1, 2009) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense.").

Sand & Gravel Co. We hold that the filing of SKF's complaint was timely in any event because the cause of action did not accrue until June 1, 2005.[14]

SKF's claim for Byrd Amendment distributions could accrue only when suit could be filed. "A limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.' " *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 195, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S.Ct. 473, 85 L.Ed. 605 (1941)) (holding that a cause of action does not accrue under a pension plan statute until the plan's trustees calculate payments and the payer then misses a scheduled payment). While SKF could have filed a facial challenge to the Byrd Amendment immediately after its enactment and could have filed suit before 2005 to challenge a pre-2005 fiscal year's distributions, here SKF could not file suit to recover fiscal year 2005 Byrd Amendment distributions

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14. While the two-year statute of limitations applies to constitutional claims for monetary recovery, *see Stone Container Corp. v. United States*, 229 F.3d 1345, 1349-50 (Fed.Cir.2000), we also need not decide whether the statute of limitations here applies to facial constitutional claims. Some cases have suggested that a limitations period could not apply to facial First Amendment claims. *See Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir.2004), *cert. denied* 544 U.S. 968, 125 S.Ct. 1725, 161 L.Ed.2d 615 (2005) ("We join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations." (citing *Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir.1991))).

until it was known whether Byrd Amendment distributions would be available.[15] When either the Byrd Amendment was passed in 2000 or when the list of eligible affected domestic producers was prepared or published in 2000 or 2001, it was not known whether there would be Byrd Amendment distributions available in 2005. For instance, Commerce could have reviewed and revoked the antidumping duty order, and then there would have been no collected duties to distribute. There might have been no imports of antifriction bearings in 2005 subject to the order, and thus no duties would have been collected. SKF also could not file suit to recover fiscal year 2005 Byrd Amendment distributions until SKF knew it had incurred qualifying expenditures during that fiscal year.

The earliest SKF's claim could have accrued was when Customs published its notice of intent to distribute duties under Byrd Amendment for fiscal year 2005 and invited potentially eligible producers to file certifications requesting a share of the distributions. This notice, including the ITC's list of affected domestic producers

15. *See also Bianchi v. United States*, 475 F.3d 1268, 1274 (Fed.Cir.2007) (determining that a cause of action seeking royalties had accrued when the amount of royalties was calculated); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988) ("It is generally stated that a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." (citing *Japanese War Notes Claimants Assoc. of the Phil., Inc. v. United States*, 178 Ct.Cl. 630, 373 F.2d 356, 358 (1967), *cert. denied*, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967))).

potentially eligible to receive such distributions, was published in the Federal Register on June 1, 2005. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed.Reg. 31,566 (June 1, 2005). SKF filed its complaint on October 3, 2005, well within the two-year statute of limitations under § 2636(i). Thus the Court of International Trade's jurisdiction over SKF's claims was not time-barred.

II

We have jurisdiction under 28 U.S.C. § 1295(a)(5), and our review of statutory and constitutional issues is de novo. *See U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1381 (Fed.Cir.2002).

Although the Court of International Trade did not reach SKF's First Amendment claims, on appeal SKF urges its First Amendment theory as its primary ground for affirming the Court of International Trade's judgment.[16] We first consider that question, recognizing in that connection our well established obligation to construe statutes to avoid constitutional difficulties.[17]

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16. We also note that another decision of the Court of International Trade held that the support requirement of the Byrd Amendment violates the First Amendment. *See PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 442 F.Supp.2d 1329, 1358-59 (Ct. Int'l Trade 2006). Appeals to our court from that decision have been stayed pending the outcome of this case.

17. *See United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909) ("[W]here

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In performing this obligation, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895)). Indeed, courts are obligated to adopt a saving construction even when the interpretation finds little support in the literal language of the statute.[18] While we need not go so far to sustain

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a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

18. For example, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994), the Supreme Court construed the Protection of Children Against Sexual Exploitation Act of 1977 to require scienter regarding the age of performers, despite the lack of support for this construction given by a grammatical reading of the statute, in order to avoid "serious constitutional doubts." *Id.* at 78, 115 S.Ct. 464. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533, (1979), the Supreme Court avoided constitutional questions by construing the National Labor Relations Act not to confer Board jurisdiction over teachers in church-operated

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the statute here, contrary to the dissent, the doctrine of constitutional avoidance is not "irrelevant," Dissenting Op. at 1368, but lies at the heart of our obligation as a reviewing court.

In addressing the constitutionality of the Byrd Amendment, it is also important to keep in mind that the statute does not prohibit particular speech. Statutes that are prohibitory in nature are rarely sustained, and cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment.

In considering limited provisions that do not ban speech entirely, the purpose of the statute is important. As the Supreme Court noted in *Ward v. Rock Against Racism*, in many contexts "[t]he government's purpose is the controlling consideration." 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). This is not to suggest

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schools, in light of "the absence of a clear expression of Congress' intent" to do so, *id.* at 507, 99 S.Ct. 1313, and despite the "[a]dmittedly . . . very broad terms" of the statute, *id.* at 504, 99 S.Ct. 1313. Also, in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) the Court construed the Railway Labor Act as not giving unions the power to use a member's dues to support political causes over the member's objection, in order to "avoid serious doubt" about the statute's constitutionality, without any basis in the statute's text. *Id.* at 749, 768-69, 81 S.Ct. 1784.

that a benign purpose will necessarily save a statute,[19] but a suppressive purpose may render it unconstitutional. Moreover, the legitimacy of a statute's purpose is important in a First Amendment analysis whether the appropriate test is strict scrutiny (requiring a determination of the state's compelling interest) or some lesser form of scrutiny (requiring a determination of the state's substantial interest).[20] Thus, purpose is a critical question, and we must first determine the purpose of the Byrd Amendment.

The government contends that the Byrd Amendment was designed to compensate domestic producers injured by dumping. That is correct.[21] The problem here is that that appears not to be the Byrd

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19. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("[O]ur cases have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (internal quotation marks omitted)).

20. *See, e.g., Simon & Schuster*, 502 U.S. at 118-19, 123, 112 S.Ct. 501 (addressing compelling interests).

21. *See Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1380 (Fed.Cir.2003) (noting that under the Byrd Amendment antidumping duties "bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behaviors"); 146 Cong. Rec. 23,117 (2000) (statement of Sen. Byrd) (describing the Byrd Amendment as designed in part for "compensation to U.S. industries" and providing a way for U.S. industries "to recover monetarily" from "losses sustained as a result of unfair foreign trade practices").

Amendment's *only* purpose. As the Court of International Trade correctly noted, the statute did not compensate all injured domestic producers, but only those who filed an antidumping petition and those who supported it. *See SKF USA Inc.*, 451 F.Supp.2d at 1361-62.

The government disagrees, arguing that the statute's only purpose was to compensate those who are injured by dumping, and that the statute simply used petition support as a surrogate for injury. In other words, the government argues that the sole purpose of the Byrd Amendment's support requirement was to identify those producers suffering the greatest injury, asserting that the Byrd Amendment distributions are "not based upon the viewpoint expressed" in antidumping proceedings. Resp./Reply Br. of Def.-Appellant U.S. Customs & Border Protection at 15, 20. We find this suggestion simply implausible in light of the statute's explicit restriction that only "a petitioner or interested party in support of the petition," 19 U.S.C. § 1675c(1)(A), may receive Byrd Amendment distributions, the absence of any evidence in the legislative history that the support requirement was designed as a proxy for injury, and the availability of far more direct and accurate methods of measuring injury.[22]

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22. Indeed, the ITC itself determines that parties may suffer material injury even though they have not supported a petition. *See* U.S. Int'l Trade Comm'n, *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom (Review)*, at 46,

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We turn then to the question of whether this subsidiary purpose renders the statute unconstitutional under the First Amendment.

SKF's theory is that the Byrd Amendment's restriction of distributions to antidumping petition supporters is impermissibly designed to penalize those who oppose antidumping petitions. SKF asserts that the Byrd Amendment "plainly discriminates among participants in an antidumping investigation on the basis of viewpoint by granting a financial benefit only to those domestic producers who publicly indicated support for a particular investigation." Br. Pl.-Cross Appellant SKF USA Inc. 40 (internal quotation marks omitted). SKF argues that the Byrd Amendment violates the First Amendment because "a manufacturer who opposes an investigation is penalized . . . for expressing its views on the matter." *Id.* As the dissent points out, Dissenting Op. at 1364, if this were the purpose of the Byrd Amendment, it might well render the statute unconstitutional under Supreme Court cases such as *Speiser v. Randall*, 357 U.S. 513, 529, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 832, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and *Legal Services Corp.*

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Publication 3309 (June 2000) ("The level or extent of industry support for continuation of an [antidumping] order alone cannot be dispositive, for we . . . are required to assess independently whether revocation [of the order] is likely to result in the continuation or recurrence of material injury.").

v. Velazquez, 531 U.S. 533, 548, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), each of which held unconstitutional the distribution of a government benefit designed to favor the speech preferred by the government.

However, this construction of the statute is not compelled or even supported by the available evidence. Neither the background of the statute, nor its articulated purpose, nor the sparse legislative history supports a conclusion that the purpose of the Byrd Amendment was to suppress expression.[23] Parties who are awarded antidumping distributions under the Byrd Amendment may say whatever they want about the government's trade policies generally or about the particular antidumping investigation, provided they do so outside the context of the proceeding itself. Even within the proceeding, the Byrd Amendment does not prohibit opposing views but merely promotes the efforts of those who support enforcement.

An alternative construction also exists that is both more consistent with the available evidence of legislative intent and may save the statute. Under this construction, the purpose of the Byrd Amendment's

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23. There is nothing in the legislative history of the Byrd Amendment to suggest that its purpose was to suppress expression. The legislative history addresses the primary purpose of the Byrd Amendment, to compensate injured parties. *See* 146 Cong. Rec. 23,117 (2000) (statement of Sen. Byrd) (referring to "our injured domestic industries" and describing the Byrd Amendment as designed in part to "help injured U.S. industries recover").

limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings. This interpretation is not only consistent with the statutory language but also is supported by the stated purpose to strengthen enforcement of the trade laws. Congressional findings supporting the Byrd Amendment state that "United States unfair trade laws have as their purpose the restoration of conditions of fair trade" and that "injurious dumping is to be condemned." Pub.L. No. 106-387, § 1002, 114 Stat. at 1549A-72; *see also* 146 Cong. Rec. 23,117 (2000) (statement of Sen. Byrd) (describing the Byrd Amendment as necessary to "deter unfair trade practices"). These findings also state that "continued dumping . . . after the issuance of antidumping orders . . . can frustrate the remedial purpose of the laws" to the detriment of "domestic producers . . . small businesses and American farmers and ranchers" and that the "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." Pub.L. No. 106-387, § 1002, 114 Stat. at 1549A-72-73.

The dissent rejects this interpretation, relying primarily on the government's representations at oral argument that the Byrd Amendment is not designed to reward those who assist in enforcement. Dissenting Op. at 1365-66. We disagree. First, the government's views that the Byrd Amendment was not designed to reward parties assisting the government is part and parcel of the government's unsuccessful effort in this litigation

(at odds even with the government's position before the World Trade Organization)[24] to suggest that the Byrd Amendment compensation scheme is only designed to compensate affected parties, a position which both the majority and the dissent reject.

Second, the views of the government as litigator are simply not binding on the issue of Congressional intent. Indeed, the Supreme Court has repeatedly rejected the government's litigation views in construing Congressional statutes. *See, e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646-47, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005) (recognizing and then rejecting the government's interpretation of a statute); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 223-24, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (rejecting the government's interpretation of a tax statute).

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24. *See* Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 4.502, WT/DS217/R, WT/DS234/R (Sept. 16, 2002), *available at* http:// www. wto. org/ english/ tratop_ e/ dispu_ e/ 217_ 234 r_ a_ e. pdf (stating as the United States position in a World Trade Organization proceeding that the Byrd Amendment "has nothing to do with the administration of the anti-dumping and countervailing duty laws" and that "[t]he amount of the [Byrd Amendment] distributions have [sic] nothing to do with the injury to the domestic producer or the recovery of 'damages' by the domestic producer").

Third, the government, while rejecting the reward construction, does not remotely support the dissent's suppression construction.

Fourth, and most importantly, the government's arguments cannot relieve us of our obligation to construe the Byrd Amendment to avoid a finding of unconstitutionality. This obligation extends to the ascertainment of a statute's purpose. Thus, for example, in *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 29 S.Ct. 527, 53 L.Ed. 836 (1909), the Supreme Court rejected the government's interpretation of the statutory purpose, concluding that if the Court adopted the government's view of the "result intended to be accomplished" by the statute, the Court would need to address several "grave constitutional questions." 213 U.S. at 404-05, 406 (1909). The Court upheld the statute by adopting a view of the purpose of the statute different from that of the government, noting that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* at 408, 412. So too, in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), the Supreme Court upheld an immigration statute's civil detention provisions by interpreting them to be limited in scope in order to avoid "a serious constitutional problem." *Id.* at 690, 121 S.Ct. 2491. The Court concluded that there was no "clear indication of congressional intent" that the statute had only the purposes asserted by the government. *Id.* at 697, 121 S.Ct. 2491. Here too,

as we have discussed, the reward construction of the Byrd Amendment is reasonable.[25]

Finally, if we were to view this case as involving the construction of statutory language rather than an exercise in ascertaining statutory purpose, the result would be the same. The language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views. Indeed, in some respects a limiting construction of the statute is necessary to cabin its scope so that it does not reward a mere abstract expression of support.[26] The Supreme Court has

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25. Relying on *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), the dissent suggests that only interests asserted by the government in litigation may be considered. Dissenting Op. at 1368-69. *Western States* stands for no such proposition. There the statute was on its face designed to (and did) prohibit speech. The Court declined to consider a justification for the prohibition that was not supported by the legislative history or the government in argument. *See Western States*, 535 U.S. at 373-74, 122 S.Ct. 1497. Here there is no prohibition, and in addressing the constitutional question we are left to choose between two constructions, neither of which is urged by the government: a purpose to suppress expression, or a purpose to reward assistance. Nothing in *Western States* remotely suggests that we can or should adopt the construction that renders the statute unconstitutional and that is less likely in light of the statute's history.

26. Thus, we construe the Byrd Amendment's language providing for payments to a "petitioner or interested party in

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frequently adopted limiting constructions of statutory language not suggested by the government. For example, the Court in *DeBartolo* adopted a limiting construction of a provision of the National Labor Relations Act despite the broad construction urged by the Board. *See DeBartolo*, 485 U.S. at 575, 108 S.Ct. 1392; *see also United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 868, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (Kennedy, J., dissenting) ("We have not considered ourselves foreclosed from adopting saving constructions the parties failed to suggest.").

We proceed to consider whether the reward construction would make the statute constitutional. To be sure, the reward construction does not render the First Amendment irrelevant. The Supreme Court has held that the First Amendment right to petition includes the right to petition the courts (and administrative agencies) for relief, so long as the petition is not objectively baseless. Thus, in *BE & K Construction Co. v. NLRB*, the Court held that the National Labor

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support of the petition" to only permit distributions to those who actively supported the petition (i.e., a party that did no more than submit a bare statement that it was a supporter without answering questionnaires or otherwise actively participating would not receive distributions). In other words, we agree with the Court of International Trade to the extent that it construed the Byrd Amendment to permit distributions to those who "participated." *SKF USA Inc.*, 451 F.Supp.2d at 1365. Each of the supporters in this case responded to an ITC questionnaire and thus participated actively in the proceeding.

Relations Board could not impose liability on an employer for litigating an unsuccessful lawsuit against a union where the lawsuit was not objectively baseless, because such litigation was protected by the First Amendment. 536 U.S. 516, 529-30, 536-37, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002). In *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.*, the Court held that the First Amendment barred the imposition of antitrust liability for commencing litigation that was not objectively baseless. 508 U.S. 49, 51, 56, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642, (1972) (recognizing that the First Amendment right to petition extends to petitioning "administrative agencies . . . and to courts").

Under that line of cases, we have little doubt that SKF's opposition to the antidumping petition here is protected First Amendment activity.[27] But as the Supreme Court has made explicitly clear, its holding in *BE & K Construction* that litigation enjoys First Amendment protection does not suggest that it is

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27. *See, e.g., Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1377 (Fed.Cir.2004) (applying *Professional Real Estate Investors* to state-law tort claims and noting that "[a] plaintiff claiming that a patent holder has engaged in wrongful conduct by asserting claims of patent infringement must establish that the claims of infringement were objectively baseless"); *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369 (Fed.Cir.1998) ("[S]ham litigation requires more than a failed legal theory." (citing *Prof'l Real Estate Investors*, 508 U.S. at 60-61 & n. 5, 113 S.Ct. 1920)).

unconstitutional to reward prevailing parties. The Court stated that "nothing in our holding today should be read to question . . . the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff." *BE & K Constr.*, 536 U.S. at 537, 122 S.Ct. 2390. Nor do the Supreme Court's cases suggest that an award of a portion of the government's recovery to a party assisting enforcement (while not rewarding those who oppose enforcement) would be unconstitutional. In other words, the First Amendment, at least in some circumstances, does not bar rewarding parties who assist the government in litigation, even if such rewards disadvantage a losing party that asserted an unsuccessful defense that is not objectively baseless.

At the same time, the Supreme Court's right to petition cases do not establish a standard for determining when such rewards would be permissible and when, if ever, they would be forbidden by the First Amendment. We think that rewarding those who support government enforcement is at least constitutional if those provisions satisfy the standards governing commercial speech. While the commercial speech doctrine typically applies to speech proposing a commercial transaction, it has been applied as well to regulation of other activities of a commercial nature. *See, e.g., IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54-55 (1st Cir.2008) (upholding a statute regulating the data mining of physician prescription histories as commercial speech). In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* itself, the Supreme Court broadly defined "commercial speech"

as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Rewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function, in this particular context assisting in the enforcement of government policy in litigation. The well established *Central Hudson* test seems appropriate.[28] *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343.

Under *Central Hudson*, regulation of lawful and non-misleading commercial speech is permissible if (1) "the asserted governmental interest is substantial," (2) "the regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." *Id.* The Byrd Amendment satisfies this test, even if we view the Byrd Amendment as regulatory in nature.[29]

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28. Even if we apply the test for speech combined with conduct in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for reasons that are clear from the text the Byrd Amendment would still be constitutional.

29. There is a serious question as to whether the Byrd Amendment should be treated as regulatory at all, since it merely rewards successful applicants. Alternatively, it might also be possible to view the Byrd Amendment as legitimately promoting the government's viewpoint. *See Rust v. Sullivan*, 500 U.S. 173, 193, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 546, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). We need not reach that question here.

First, preventing dumping is a substantial government interest. Congress has broad powers under the Constitution to regulate trade. *See* U.S. Const., Art. I, § 8, cl. 3; *see also Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56, 53 S.Ct. 509, 77 L.Ed. 1025 (1933) (Congress has "plenary" power to regulate foreign commerce); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193, 6 L.Ed. 23 (1824). In addition, "[s]o long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)). No party here questions the authority of the government to ban dumping or to spend money to enforce the antidumping laws.

Second, the Byrd Amendment directly advances the government's substantial interest in trade law enforcement by rewarding parties who assist in this enforcement. The government has a substantial interest in rewarding those who assist in the enforcement of government policy. We are not aware of any Supreme Court case that rejects the legitimacy of such rewards. Indeed, given its limited resources, it is now common for the government to reward those who assist in enforcing government policies through litigation or administrative proceedings. Such rewards may take a variety of forms. For example, qui tam actions reward private parties for successfully bringing suit on behalf

of the government.[30] Such rewards have a long history. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77, and nn. 5-7, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (describing the history of qui tam and informer statutes in England and the United States). Other statutes do not authorize private parties to commence the actions but allow the private parties a portion of the government's recovery or otherwise reward the private parties' assistance to the government. *See* 26 U.S.C. § 7623 (awarding a portion of the collected proceeds to whistleblowers who assist the Internal Revenue Service in detecting tax underpayments); 19 U.S.C. § 1619 (allowing compensation of informers who help enforce the customs laws). The government also rewards parties who vindicate government policy through the award of attorney's fees to successful plaintiffs, for example, in actions under Title VII of the Civil Rights Act of 1964 and other statutes.[31]

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30. *See* 31 U.S.C. § 3730(b) (permitting private parties to sue as qui tam relators on behalf of the government under the False Claims Act, 31 U.S.C. § 3729, which provides penalties and damages for presenting false or fraudulent monetary claims to the government); *Id.* § 3730(d) (rewarding False Claims Act qui tam relators with between 10 and 30 percent of the government's recovery).

31. *See, e.g.*, S.Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (discussing the Civil Rights Attorney's Fees Awards Act of 1976: "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have

(Cont'd)

The government's authority to reward those who assist in enforcement is generally unquestioned, and as discussed above, the Supreme Court's decision in *BE & K Construction* appears to conclude that such awards are generally permissible under the First Amendment. The Supreme Court's decision in *Legal Services Corp. v. Velazquez* is not to the contrary. In *Velazquez*, the Supreme Court invalidated Congressional restrictions that barred government-funded legal services attorneys "from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution." 531 U.S. at 537, 121 S.Ct. 1043. *Velazquez* hardly suggests that the government could not reward those who assist in supporting the validity of federal statutes. It rests entirely on the proposition that legal services lawyers did not perform that role. Rather they represented the interests of independent clients (who might or might not support the legislation) and not the interests of the government.[32]

(Cont'd)

a meaningful opportunity to vindicate the important Congressional policies which these laws contain."); 42 U.S.C. § 1973/(e) (allowing attorney's fees to be awarded to prevailing parties other than the United States in the enforcement of voting rights).

32. The Byrd Amendment is also unlike the city ordinance granting casino development preferences only to developers promoting the passage of gambling legislation. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich.*

(Cont'd)

In contrast, the Byrd Amendment—like qui tam proceedings, monetary awards of a portion of the government's recovery, and awards of attorney's fees—shifts money to parties who successfully enforce government policy. It is significant here that those who bring and support antidumping petitions receive Byrd Amendment distributions only if the antidumping petition is successful. The Byrd Amendment does not reward unsuccessful efforts.[33] At bottom, neither SKF nor its supporting amici appear to contend that parties providing significant assistance to the government in enforcing the antidumping laws may not be rewarded.

The remaining question is whether the Byrd Amendment is overly broad. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. At oral argument SKF agreed that petitioners in antidumping proceedings

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Gaming Control Bd., 172 F.3d 397, 409-10 (6th Cir.1999) (holding that the ordinance was "content-based" and thus subject to strict scrutiny review under the First Amendment). The ordinance at issue in *Lac Vieux* did not reward the achievement of the enforcement of government policy through litigation, but instead involved "political support" for legislative efforts. *Id.* at 408.

33. Fewer than half of the antidumping petitions brought from 1980 to 2006 were successful. Of the 1,110 antidumping cases, 469 or 42.3% received a final affirmative ITC determination. *See* (U.S. Int'l Trade Comm'n, *Import Injury Investigations Case Statistics (FY 1980-2006)*, at 3 n. 6 (January 2008), *available at* www. usitc. gov/trade_remedy/Report-01-08-PUB.pdf).

supply substantial assistance to the government in enforcing the trade laws. While in theory Commerce may itself initiate an antidumping duty investigation under 19 U.S.C. § 1673a(a), it is common for the government to rely on the filing of a private party petition with Commerce for an antidumping duty investigation under 19 U.S.C. § 1673a(b).[34] Not only do petitioners call the government's attention to the existence of a violation (similar to an informer), they provide substantial assistance during the course of investigations. The general role of an antidumping petitioner is to gather and present information reasonably available to it in order to support its allegations that dumping is occurring and materially injuring a domestic industry. *See* 19 U.S.C. § 1673a(b)(1); 19 C.F.R. § 351.202(b); 19 C.F.R. § 207.11. In the antifriction bearing petition underlying this case, petitioner Torrington prepared and submitted the petition and then at two ITC proceedings appeared through counsel and submitted briefs to support its arguments. The Byrd Amendment's reward of such assistance serves to advance the government's interest in enforcing its trade laws.[35]

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34. *See* 19 C.F.R. § 351.202(a) ("The Secretary [of Commerce] normally initiates antidumping and countervailing duty investigations based on petitions filed by a domestic interested party.").

35. The dissent rejects the view that rewarding petition supporters satisfies this third prong of the *Central Hudson* test. Dissenting op. at 1373-74. For the reasons stated in the text, we disagree. Notably, the dissent fails to explain why an even narrower construction of the statute—urged by Timken—limiting the rewards to petitioners alone would not render the statute constitutional.

However, SKF appears to contend that the government's interest does not extend to rewarding those who merely support the petition.[36] The support requirement in the Byrd Amendment reflects the ITC's practice of asking questionnaire recipients to advise the ITC whether they support, oppose, or take no position on an antidumping petition. This support question is part of the ITC's material injury investigation and is not designed solely to determine eligibility for Byrd Amendment distributions. This practice indeed was established many years before the passage of the Byrd Amendment in 2000. *See, e.g.*, J.A. 73 (Producers' Questionnaire in the ITC's antifriction bearings antidumping duty investigation in 1989); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 981 (Fed.Cir.1994) (referring to the support question in a 1987 ITC antidumping investigation questionnaire). Those who support antidumping petitions typically fill out questionnaires from the ITC. Each of the successful Byrd Amendment claimants here did so.

While those supporting a petition by completing a questionnaire may supply less assistance than petitioners, the *Central Hudson* test does not require perfect correspondence of means and ends. As the Supreme Court held in *Board of Trustees of the State*

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36. However, SKF itself recognizes the contribution made by petition supporters: "[i]t is based on the information supplied by the domestic producers that participate in an investigation that the ITC reaches an injury determination, which leads to the issuance of an order." Br. Pl.-Cross Appellant SKF USA Inc. at 48.

University of New York v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the "not more extensive than is necessary" portion of the *Central Hudson* test requires "a fit that is not necessarily perfect, but reasonable" and "leave[s] . . . to governmental decisionmakers to judge what manner of regulation may best be employed." *See also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (upholding a statute's "incidental burden on speech" under the First Amendment because "[i]t suffices that the means chosen by Congress add to the effectiveness of" the government's substantial interest, applying the expressive conduct test formulated in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 117 (1st Cir.2005).

ITC questionnaires in particular are extremely detailed, requesting several years of data on a domestic producer's shipments, employment, sales, finances, pricing, customers, and competitors. *See, e.g.*, U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire, *available at* http:// www. usitc. gov/ trade_ remedy/ 731_ ad_ 701_ cvd/investigations/question/USProducer Questionnaire.pdf. In proceedings before the World Trade Organization, the government has recognized that the costs of responding to such questionnaires are substantial. *See* Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 4.834, WT/DS217/R, WT/DS234/R, (Sept. 16, 2002), *available at* http:// www. wto. org/ english/ tratop_ e/

dispu_ e/ 217_ 234 r_ a_ e. pdf (suggesting in a World Trade Organization proceeding that the cost of filing or supporting a U.S. antidumping petition would be "a million plus dollars"). The record here demonstrates that petition supporters in the antifriction bearing antidumping investigation spent substantial sums preparing their questionnaire responses. Indeed, the government has gone so far as to suggest that Byrd Amendment distributions are not of sufficient size to adequately compensate those who support such petitions for their efforts. *See id.* ("The costs of participating in an investigation for an industry, already materially injured or threatened with material injury, could be far greater than the [potential Byrd Amendment] disbursements received years later.").

To be sure, domestic industry participants opposing the petition are also required to fill out questionnaires, as SKF did in this case. However, Congress could permissibly conclude that it is not required to reward an opposing party.

Opposing parties' interests lie in defeating the petition, typically (as is the case here) because the domestic industry participant is owned by a foreign company charged with dumping. Indeed, SKF here undertook a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case. At the ITC's April 21, 1988, preliminary determination conference, SKF urged through counsel that Torrington's petition be denied, and provided an analysis of data to refute Torrington's assertion that

the U.S. antifriction bearing industry was being or was about to be materially injured by dumping. At the ITC's March 30, 1989, final determination hearing, SKF urged through counsel that the domestic antifriction bearing industry was not being materially injured by dumping and was not threatened with material injury. To support this argument, SKF's president testified that the history of the production capacity, capital investments, and sales prices of the domestic antifriction bearing industry demonstrated that it was not being materially injured. SKF submitted an economic analysis brief, and at the hearing SKF's economic expert, Dr. Peter Linneman, a professor at the Wharton School of the University of Pennsylvania, testified about how his pricing analysis of the antifriction bearing industry showed no evidence of actual or threatened material injury. SKF's counsel also introduced testimony from the executives and counsel of several foreign antifriction bearing producers that opposed Torrington's petition.

Opponents may equally impede the investigation simply by refusing to cooperate. This is recognized by the statute itself, which recognizes that such failure to cooperate is a serious problem, and allows Commerce and the ITC to use "facts otherwise available" in making antidumping determinations when a party "withholds information that has been requested," "fails to provide such information," "significantly impedes a proceeding," or provides unverifiable information. 19 U.S.C. § 1677e(a). The statute further allows Commerce and the ITC to find that a party has "failed to cooperate by not acting to the best of its ability to comply with a

request for information," and to subject such an uncooperative party to "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" when Commerce and the ITC make antidumping determinations. 19 U.S.C. § 1677e(b); *see also* H.R.Rep. No. 103-826 (Part I), at 105 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3877. At various times we have upheld the efforts of Commerce and the ITC to compel a response from recalcitrant respondents or use the "facts available" mechanism.[37]

At best the role of parties opposing (or not supporting) the petition in responding to questionnaires is similar to the role of opposing or neutral parties in litigation who must reluctantly respond to interrogatories or other discovery. There is no suggestion that such parties must be favored by an award of attorney's fees or other compensation similar to that given to prevailing plaintiffs who successfully enforce government policy. It was thus rational for Congress to conclude that those who did not support the petition should not be rewarded. We emphasize again that Congress rewards only successful enforcement

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37. *See, e.g., Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed.Cir.2003) ("[T]he statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do."); *F. lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) ("[I]t is within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative.").

effort. Where the petition is unsuccessful, neither petition supporters nor opposers receive government payments under the Byrd Amendment.

In summary, the Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment.[38]

III

Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.

SKF's equal protection challenge to the Byrd Amendment is based on the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *see also Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975))). The applicable standard is rational basis review. *See Hodel v. Indiana*, 452 U.S. 314, 331, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) ("Social and economic legislation . . . that does not employ suspect

38. For the same reason, the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech.

classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979))). We reject SKF's equal protection challenge because we find that the Byrd Amendment is rationally related to the government's legitimate purpose of rewarding parties who promote the government's policy against dumping. The Byrd Amendment does not violate the equal protection guarantees of the Fifth Amendment.

In light of our disposition of this case, SKF's claim that the Court of International Trade improperly denied SKF's amended certification is moot.

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade is reversed.

REVERSED

COSTS

No costs.

LINN, Circuit Judge, dissenting.

The so-called "petition support requirement" of the Byrd Amendment requires that a company publicly express "support of the petition" resulting in an antidumping duty order in order to be eligible to receive any funds collected as a result of the order. 19 U.S.C. § 1675c(b)(1)(A) (2000) (repealed 2006). Put simply, under the petition support requirement, if a domestic company publicly expresses the viewpoint that the government should impose a tariff on an importer, then the domestic company is eligible to receive some part of that tariff. If the domestic company either expresses the viewpoint that a tariff should not be imposed or takes no public position, it is not eligible.

The majority concedes that the petition support requirement implicates the First Amendment, but it concludes that the Byrd Amendment satisfies the test for regulation of commercial speech, because "reward[ing] injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings" is "similar to commercially contracting with them to assist in the performance of a government function." Maj. Op. at 1352, 1355. I respectfully disagree.

The Byrd Amendment has nothing to do with rewarding helpfulness during trade investigations as the majority suggests. The majority errs by relying on the statutory construction doctrine of constitutional avoidance to graft its "reward" purpose onto the statute,

when that purpose is not apparent in the statutory text or legislative history and has been expressly disclaimed by the government in this case. The majority compounds this error by using its "reward construction" of the petition support requirement to justify evaluating the constitutionality of the requirement under the more lenient commercial speech doctrine, when, in fact, the petition support requirement regulates pure political speech and—by the language of the statute itself—"petition[ing]." *See* U.S. Const. amend. 1 ("Congress shall make no law . . . abridging . . . the right . . . to petition the Government for a redress of grievances"). Because I would conclude that the petition support requirement is an unconstitutional viewpoint discriminatory restriction on political speech and petitioning activity that cannot survive strict scrutiny, I respectfully dissent.[1]

I

Under 19 U.S.C. § 1673, an antidumping duty can only be imposed if the Department of Commerce ("Commerce") first determines that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" and the International Trade Commission ("ITC") then determines that a domestic industry "is materially injured, or . . . is threatened with material injury." The purpose of an

1. While I disagree with section II of the majority's opinion, I agree with the majority's analysis of the Court of International Trade's jurisdiction as set forth in section I of its opinion. *See* Maj. Op. § I.

antidumping investigation is to determine whether these two criteria have been satisfied. *See, e.g.*, 19 U.S.C. § 1673a(a)(1) ("An antidumping duty investigation shall be initiated whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 1673 of this title exist.").

Critically, an antidumping duty order is neither required nor even permitted in every case of dumping. As the majority correctly points out, "dumping" is merely "the sale or likely sale of goods at less than fair value." *Id.* § 1677(34). But an antidumping duty order requires an additional finding of material injury to the domestic industry. The companies that make up the domestic industry may reasonably disagree as to whether particular dumping has "materially injured" the domestic industry as a whole. Indeed, recognizing the complex and somewhat subjective nature of the material injury requirement, we have held that the ITC "has broad discretion" in determining whether the domestic industry has been materially injured. *Nucor Corp. v. United States*, 414 F.3d 1331, 1336-37 (Fed.Cir.2005) (concluding that ITC's methodology in assessing material injury is entitled to *Chevron* deference). Thus, one member of the domestic industry may honestly believe that the industry is not harmed by particular dumping, while another member may honestly believe that the industry has been harmed. It is the ITC's obligation to sort out these conflicting views in an antidumping duty investigation.

Appendix A

During the course of the ITC's investigation, the ITC submits questionnaires to domestic producers in the affected industry. As the majority notes, these questionnaires are "extremely detailed, requesting several years of data on a domestic producer's shipments, employment, sales, finances, pricing, customers, and competitors" and "the costs of responding to such questionnaires are substantial." Maj. Op. at 1358. Yet all members of the domestic industry who receive such a questionnaire are required by law to complete it. *See* 19 U.S.C. § 1333(a), (f) (authorizing ITC to request information, issue subpoenas, and demand statements under oath); *see also* U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire ("*Producers' Questionnaire*"), at 1, *available at* http:// www. usitc. gov/ trade_ remedy/ 731_ ad_ 701_ cvd/ investigations/ question/ USProducer Questionnaire. pdf ("This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession. . . ."). Moreover, each questionnaire requires that an authorized company official certify the correctness of all responses. *Producers' Questionnaire* at 1.

The questionnaire includes various questions related to the harm that the member of the domestic industry has suffered as a result of alleged dumping. Specifically, the questionnaire includes question III-14, which asks whether the domestic company "experienced any actual negative effects on its return on investment or its growth, investment, ability to raise capital,

existing development and production efforts (including efforts to develop a derivative or more advanced version of the product), or the scale of capital investments as a result of imports of" the allegedly dumped product. *Id.* at 13. Likewise, question III-15 asks whether the domestic company "anticipate[s] any negative impact of imports of" the allegedly dumped product. *Id.* Questions IV-20 and IV-21 also ask for detailed information about any lost revenues or lost sales as a result of dumping. *Id.* at 24-25.[2]

In addition to all of these questions about the harm that the alleged dumping has caused each domestic producer, the questionnaire includes, in its "General Information" section, question I-3, which asks simply "Do you support or oppose the petition?" *Id.* at 2. Question I-3 offers three possible choices with corresponding checkboxes: "Support," "Oppose," and "Take no position." *Id.* at 2.[3] It is the domestic producer's response to this question that the ITC uses to determine whether the "petition support requirement" of the Byrd Amendment has been satisfied.

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2. Similar questions appeared on the version of the questionnaire that SKF completed in 1989. *See* Final Questionnaire of SKF USA, Inc. at 106-07.

3. The equivalent to this question that appeared in the version of the questionnaire that SKF completed in 1989 was question I.2, which asked "Please indicate, by checking the appropriate box, the position that your firm takes with respect to the petition. (CHECK ONLY ONE)" and offered the choices "Supports the petition," "Opposes the petition," and "Does not wish to take a position on the petition." *See* Final Questionnaire of SKF USA, Inc. at 6.

Notably, Commerce also uses responses to question I-3 to determine whether a petition seeking imposition of an antidumping duty is filed "on behalf of the industry"—as is required by 19 U.S.C. § 1673a. For a petition to meet this requirement, "domestic producers or workers who support the petition [must] account for at least 25 percent of the total production of the domestic like product" and "domestic producers or workers who support the petition [must] account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition." *Id.* § 1673a(c)(4)(A)(i)-(ii). In other words, question I-3 is an opportunity for each member of the domestic industry to vote on whether a petition should or should not go forward. To go forward, the petition needs the votes of at least 25% of the domestic industry by production, and no more than 50% in opposition.

Under the Byrd Amendment, United States Customs and Border Protection ("Customs") disburses duties collected pursuant to antidumping duty orders to "affected domestic producers" who submit a certification claiming that they have incurred certain specified types of expenditures. *Id.* § 1675c. Though the ordinary meaning of "affected domestic producer" would not seem to require that the producer have taken any particular position in the antidumping duty investigation that resulted in the antidumping duty order, the Byrd Amendment includes a special definition of "affected domestic producer" that imposes just such a requirement:

The term "affected domestic producer" means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—

> (A) was a *petitioner or interested party in support of the petition* with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.

Id. § 1675c(b)(1) (emphasis added).

SKF participated in the investigation that led to the antidumping order at issue in this case, but SKF opposed the petition on the ground that the domestic industry was not being materially injured by dumping. The ITC disagreed with SKF and found material injury. But even though SKF is a member of the injured industry, SKF is precluded from receiving distributions by operation of the petition support requirement, as a result of expressing its view that an antidumping duty order should not be imposed.

II

The majority begins its First Amendment analysis by reciting the well known doctrine of constitutional avoidance, which holds that "[w]here an otherwise

acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (*cited in* Maj. Op. at 1349). Applying this doctrine, the majority concludes that the purpose of the Byrd Amendment was not, as the government argues, only "to compensate those who are injured by dumping," Maj. Op. at 1351, but rather "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings," *id.* at 26. From this conclusion, the majority reasons that evaluating the petition support requirement under the commercial speech doctrine "seems appropriate," because "[r]ewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function." *id.* at 31. Applying the *Central Hudson* test for commercial speech, the majority concludes that the petition support requirement survives First Amendment scrutiny, and that the petition support requirement "is not more extensive than is necessary to serve [the government's] interest" in rewarding injured parties who assist in antidumping investigations. *Id.* at 31 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)).

While the majority opinion is well written, thoughtful, and thorough, I respectfully disagree with

several aspects of the majority's analysis. First, the majority focuses on the Byrd Amendment as a whole, rather than on the challenged portion of the Byrd Amendment—namely, the petition support requirement in the definition of "affected domestic producer." SKF does not challenge the constitutionality of imposing a duty on dumped goods that harm a domestic industry, nor does it challenge the constitutionality of distributing the duties collected as a result of antidumping orders to domestic producers. To the contrary, SKF challenges only the petition support requirement of 19 U.S.C. § 1675c(b)(1)(A). That is, SKF challenges only the aspect of the Byrd Amendment that precludes it from receiving duties solely because it answered "Oppose" to question I-3 of the investigation questionnaire. Thus, the issue is whether the petition support requirement—not the Byrd Amendment as a whole—survives First Amendment scrutiny. *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 774-75, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (focusing on specific challenged clause of statute and holding that "[u]nder the strict-scrutiny test, respondents have the burden to prove that the [challenged] clause is (1) narrowly tailored, to serve (2) a compelling state interest"). Thus, it is not, as the majority suggests, the government's "interest in trade law enforcement" that matters. Maj. Op. at 1355. The relevant interest is the government's more limited interest in conditioning receipt of distributions on public support for an antidumping position.

Second, in my view, the majority's undue focus on "determin[ing] the purpose of the Byrd Amendment,"

Id. at 23, is inconsistent with the Supreme Court's First Amendment jurisprudence. The Supreme Court has made clear that it is a statute's effect on speech that matters, not its intended purpose. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (internal quotation marks omitted)). The question is not whether Congress intended the Byrd Amendment to violate the First Amendment. The question is whether it does.

To be sure, determining whether the government interest served by a restriction on speech is "compelling"—or, in some cases, "important" or "substantial"—is a part of the First Amendment analysis. *See, e.g., Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (holding that content-based restrictions on political speech in public forum must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983))); *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343 (assessing whether "the asserted governmental interest is substantial"); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (assessing

whether regulation "furthers an important or substantial governmental interest"). But the Byrd Amendment's purpose plays a much greater role in the majority's analysis than serving an important government interest. The majority uses its view of the purpose of the Byrd Amendment to shield the petition support clause from strict scrutiny under the First Amendment entirely. Specifically, the majority reasons that *because* the purpose of the Byrd Amendment was to reward injured parties who assisted government enforcement of the antidumping laws, then the petition support requirement is "similar to commercially contracting with [parties] to assist in the performance of a government function, in this particular context assisting in the enforcement of government policy in litigation." Maj. Op. at 1355. Thus, the majority uses the purpose of the Byrd Amendment as justification for applying the more lenient *Central Hudson* test, rather than strict scrutiny. I know of no case—and the majority has cited none—in which an unambiguous statute that would otherwise be subject to strict constitutional scrutiny receives more lenient scrutiny because of its perceived purpose.

Third, I believe that the majority is incorrect in concluding that that purpose is to reward parties that assist the government in antidumping investigations. *Id.* at 1352 ("[T]he purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings."). There is nothing in the

statutory text or legislative history of the Byrd Amendment to suggest that its purpose was to reward assistance or cooperation with the government's investigation of dumping. To the contrary, the purpose of the Byrd Amendment was to compensate domestic producers injured by dumping. The text and structure of the statute itself makes that clear in specifying that distributions are made to "affected domestic producer[s]"—domestic producers that have been "affected" (i.e., injured) by dumping. 19 U.S.C. § 1675c. The majority relies on general statements in the Congressional findings that "United States unfair trade laws have as their purpose the restoration of conditions of fair trade" and that "injurious dumping is to be condemned." Maj. Op. at 1352. But neither these statements nor anything else in the statutory text says anything at all about rewarding parties for "assist[ing] government enforcement" in antidumping proceedings.

Moreover, the legislative history of the Byrd Amendment supports the view that its purpose was to compensate injured domestic producers: "Current law also does not contain a mechanism to help injured U.S. industries recover from the harmful effects of foreign dumping and subsidization." 145 Cong. Rec. S497, 497 (1999) (statement of Sen. DeWine). The majority's reliance on general statements in the legislative history—e.g., that the Byrd Amendment is necessary to "deter unfair trade practices" and that "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved"—is to no avail, because none of these statements says

anything about rewarding parties for helping to enforce trade laws. Maj. Op. at 1352.

I note further that the majority's "reward for assistance" rationale was not argued by either of the two government agencies that are parties to this appeal. To the contrary, the government argued that the purpose of the Byrd Amendment was *solely* compensation for injury, not reward for assistance: "Simply stated, as a supplement to unfair trade laws already in existence, in the [Byrd Amendment], Congress chose to provide a separate monetary remedy to a subset of domestic producers that were the *most seriously injured* by foreign unfair trade practices, and it rationally assumed that this subset of most-harmed producers would be those producers that had supported the petition." Br. of Defendant-Appellant U.S. Customs & Border Protection at 20-21 (emphasis added). At oral argument, the government expressly and repeatedly rejected the court's suggestion that the Byrd Amendment was intended to reward parties for assisting the government. *See* Oral Arg. at 14:25-31, 15:18-23 available at http:// oralarguments. cafc. uscourts. gov/ mp 3/ 2008- 1005. mp 3 (government responding to question about purpose of Byrd Amendment "to reward people who bring these antidumping petitions and those who support the petition" by stating that "[t]he purpose of this classification should not really be seen as one of rewarding"); *id.* at 25:15-31 ("There is nothing in that statute, your honor, that indicates any attempt to reward parties as opposed to provide a subsidy to American manufacturers who have been injured."); *id.* at 1:03:42-

1:04:36 ("The parties seem to be in agreement that this statute and the classification is really not that similar to the situation of relators in qui tam cases where they are providing a service to the government and receiving some amount by statute as a reward for having brought to the attention of the government fraud, waste, and abuse."); *see also id.* at 23:34-24:03 ("It was . . . apparent on the face of the findings of Congress that preceded the [Byrd Amendment] and also the floor statements of Senator DeWine and Senator Byrd that this was intended to be a remedial statute that was going to aid members of domestic industry that continue to be injured by dumping. . . .").

The majority dismisses the government's repeated statements rejecting the "reward for assistance" rationale.[4] Specifically, the majority argues that "the views of the government as litigator are simply not binding on the issue of Congressional intent." Maj. Op. at 1352. But—as the majority's own parenthetical summaries make clear—the cases that the majority cites

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4. The majority states that I "rely[ ] primarily on the government's representations at oral argument" to conclude that the purpose of the Byrd Amendment is not the "reward for assistance" rationale that the majority advances. Maj. Op. at 1352. As discussed in detail, the statutory text of the Byrd Amendment, its legislative history, the conduct of antidumping investigations in practice, and the example of this very case all make clear that the purpose of the Byrd Amendment was not to reward companies for assisting the government in antidumping investigations. The fact that the government agrees that "reward for assistance" was not the purpose of the Byrd Amendment is only one of many reasons that I would reject it.

for that proposition all address the views of the government as to the proper interpretation of ambiguous statutory language, not to the asserted *purpose* of a statute for purposes of constitutional scrutiny. *See Id.* (*"Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646-57, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005) (recognizing and then rejecting the government's *interpretation of a statute*); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 223, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (rejecting the government's *interpretation of a tax statute*)" (emphases added)). The Supreme Court has recognized that it is the government's "asserted" purpose that is relevant in assessing the constitutionality of a statute—i.e., the purpose that the government as litigator asserts to justify the statute in the face of a constitutional challenge. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 296, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) ("The asserted interests . . . are undeniably important"); *Texas v. Johnson*, 491 U.S. 397, 407, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("[W]e must decide whether Texas *has asserted an interest* in support of Johnson's conviction that is unrelated to the suppression of expression. . . . " The State offers two separate interests to justify this conviction. . . .) Thus, the burden is on the government–in litigation—to identify the interest served by the regulation and to prove that it is "compelling," "substantial," or "important." *See, e.g., Boos*, 485 U.S. at 321, 108 S.Ct. 1157 ("[W]e have *required the State to show* that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (internal quotation marks omitted and emphasis added)). In fact, in *Central*

Hudson—the very case that establishes the commercial speech test that the majority applies—the Supreme Court made clear that it is the interest that the government asserts in litigation challenging a regulation that is relevant for the constitutional inquiry:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the *asserted* governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest *asserted*, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343 (emphases added). Thus, it is the government's asserted purpose—not the "reward for assistance" purpose expressly rejected by the government—that is relevant to the First Amendment analysis here. It is not the role of the court to substitute its judgment for that of the government and to decide which interest the government should have "asserted."

The majority also relies heavily on the doctrine of constitutional avoidance, which it suggests "extends to the ascertainment of a statute's purpose." Maj. Op. at 1353. The well-established "canon of constitutional avoidance" holds that "[w]here a possible construction of a statute would render the statute unconstitutional, courts must construe the statute 'to avoid such problems unless such construction is plainly contrary to the intent of Congress.' " *Consolidation Coal Co. v. United States*, 528 F.3d 1344, 1347 (Fed.Cir.2008) (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575, 108 S.Ct. 1392). The doctrine of constitutional avoidance is a doctrine of statutory interpretation—that is, it is relevant when the court is construing disputed statutory language. *See, e.g., Fisherman's Harvest, Inc. v. PBS & J*, 490 F.3d 1371, 1377 (Fed.Cir.2007) (discussing "canon of constitutional avoidance in statutory interpretation"). In this case, there is no statutory construction to be performed. The parties do not dispute the meaning of the petition support requirement, and the parties do not dispute that, if the petition support requirement is constitutional, it was correctly applied to SKF. There is therefore no statutory construction dispute, and the doctrine of constitutional avoidance is irrelevant.

The majority, however, reasons that the doctrine of constitutional avoidance "extends to the ascertainment of a statute's purpose." Maj. Op. at 1353. That is, in the majority's view, when evaluating whether a statute serves a compelling, substantial, or important government interest, the court should look not to the

interest that is clear from the statutory text or legislative history, nor to the interest that the government actually puts forward during litigation, but rather to any interest that "would make the statute constitutional." *Id.* at 1354. I respectfully disagree. While it is proper under rational basis review to evaluate whether any hypothetical interest would render a statute constitutional, under the heightened scrutiny required by the First Amendment, we evaluate only the government's actual, asserted interest. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-74, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) ("The dissent describes another governmental interest. . . . Nowhere in its briefs, however, does the Government argue that this interest motivated the advertising ban. Although, for the reasons given by the dissent, Congress conceivably could have enacted the advertising ban to advance this interest, we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational. The *Central Hudson* test is significantly stricter than the rational basis test . . . ." (citations omitted)); *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("Unlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."). I cannot agree that the doctrine of constitutional avoidance allows us to ignore the government's asserted purpose and substitute our own when heightened First Amendment scrutiny applies.

Moreover, though the majority cites two cases for its theory that the doctrine of constitutional avoidance extends to the "ascertainment of a statute's purpose," Maj. Op. at 1353, those cases actually involve the interpretation of statutory language—not the government interest served by the statute. In the pre-*Lochner Delaware & Hudson* case on which the majority principally relies, the Supreme Court did apply the principle of constitutional avoidance and make reference to the government's view concerning the "result intended to be accomplished" by the statutory provision at issue, but it did so solely for the purpose of construing disputed statutory language. *See U.S. ex rel Attorney Gen. v. Del. & Hudson Co*, 213 U.S. 366, 404-05, 29 S.Ct. 527, 53 L.Ed. 836 (1909) ("Let us, *as a prelude to an analysis of the [statutory] clause, for the purpose of fixing its true construction*, and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one."). Likewise, the *Zadvydas* case on which the majority relies considered the doctrine of constitutional avoidance solely for the purpose of statutory construction. *See Zadvydas v. Davis*, 533 U.S. 678, 689-90, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) ("[W]e read an implicit limitation into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's postremoval-period detention to a period reasonably necessary to bring about that alien's removal from the United States. . . . A statute permitting indefinite detention of an alien

would raise a serious constitutional problem."). I am aware of no case in which the Supreme Court has applied the doctrine of constitutional avoidance—as the majority does here—to determine the asserted purpose of an unambiguous statute in a constitutional challenge.

It also seems to me that the "reward for assistance" rationale for the Byrd Amendment makes little sense in light of the regulations governing the conduct of antidumping investigations. All members of the domestic industry who receive a questionnaire—whether they support the petition or not—are required to complete the questionnaire and to certify to its accuracy. Moreover, the ITC has the authority to subpoena any additional information that it needs from otherwise unwilling companies. *See* 19 U.S.C. § 1333(a), (f); *Producers' Questionnaire* at 1. This explains why the government admitted at oral argument that petition supporters and petition opponents provide exactly the same assistance to the government in antidumping investigations. *See* Oral Arg. 22:41-23:07 ("[W]hat the government obtains form the questionnaire responses is the same for those who supported and thereby are eligible under the classification the [Byrd Amendment] to receive these funds and for those who opposed or took no position. So, *they are also aiding the government* in a government function in that respect. Certainly that is true." (emphasis added)); *see also id.* at 18:50-19:10 ("[Companies that do not support the petition] are required by law to respond to the questionnaire in the same way that those who have answered the question checking support are required

to do so."); *id.* at 20:10-28 ("[The Court:] Is there something different that parties who support the petition provide to the government as compared to parties that don't support the petition? [The government:] Not that I'm aware of. I don't think that that is an important distinction. . . .").

The facts of this case illustrate why the purpose of the Byrd Amendment cannot have been the reward for assistance rationale that the majority suggests. The majority details the submissions that petitioner Torrington and petition supporters made during the investigation that led to the antidumping order in this case. *See* Maj. Op. at 1342 (noting that "the petition was over 200 pages in length"); *id.* at 1343-44 ("The questionnaire responses of these petition supporters were hundreds of pages long, and several of the supporters prepared responses exceeding 300 pages."); *id.* at 11 ("Petitioner Torrington's pre-hearing brief was over 200 pages long. . . ."). The majority also notes that "SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition," *id.* at 1343, but what the majority fails to point out is that SKF's questionnaire responses also totaled *more than 200 pages. See* Preliminary and Final Responses of SKF USA, Inc. (242 pages). In fact, if, as the majority's analysis suggests, assistance in an antidumping investigation can be measured in part by the page length of questionnaire responses, SKF was actually *more* helpful that several supporters of the petition that have received distributions under the Byrd Amendment. *See, e.g.*, Response of Emerson Power Transmission Co.

(122 pages). Likewise, while the majority claims that Torrington's briefing "assisted in the investigation," Maj. Op. at 1343, it fails to acknowledge that SKF also submitted briefing—totaling 163 pages—during the investigation.

To the extent that the majority recognizes SKF's participation in the antidumping investigation, the majority sees it as evidence *against* SKF, going so far as to suggest that SKF "impede[d] the investigation" by opposing it. *See Id.* at 39-40. However, SKF did nothing to impede, and merely expressed its view that the domestic industry was not being or about to be materially injured by the alleged dumping. SKF, like other petition opponents, submitted expert analysis and briefing supporting that view to the ITC. The majority does not suggest that SKF withheld any information or submitted any evidence or argument in bad faith. To the contrary, SKF's only "fault" was that the ITC ultimately disagreed with it and concluded that the domestic industry was, in fact, harmed—a decision that the ITC had not yet made at the time SKF opposed the petition, and a decision that we have held is firmly committed to the ITC's discretion. *See Nucor*, 414 F.3d at 1336 (noting ITC's "broad discretion" in assessing material injury). If taking an opposing view in a proceeding were tantamount to "impeding" an investigation, then every losing party in every action to which the government is a party (not to mention every criminal defense attorney) would be guilty of obstruction. SKF, acting in good faith, assisted in the antidumping investigation by complying with its

obligation to submit detailed questionnaire responses, by submitting expert evidence and briefing, and by providing its honest viewpoint to the ITC. The only difference between SKF and the petition supporters was that SKF thought that the ITC should have come to a different conclusion. This illustrates precisely why rewarding petition supporters for their assistance in an investigation cannot have been the Byrd Amendment's purpose.

My fourth disagreement with the majority concerns its conclusion that the First Amendment test for commercial speech "seems appropriate" in this case. Citing *Central Hudson*, the majority concludes that the Supreme Court has "broadly defined 'commercial speech' as 'expression related solely to the economic interest of the speaker and its audience.' " Maj. Op. at 1355. But *Central Hudson* did not concern whether the speech at issue—advertising by an electric company—was or was not commercial. The parties agreed that the speech was commercial. *Central Hudson*, 447 U.S. at 560-61, 100 S.Ct. 2343. The case in which the Supreme Court actually considered the definition of commercial speech came three years later. In *Bolger v. Youngs Drug Products Corp.*, the Supreme Court considered whether informational pamphlets distributed by a contraceptive manufacturer and promoting the use of prophylactics were commercial speech. 463 U.S. 60, 62, 65-66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). The Supreme Court recognized that "the core notion of commercial speech [is] speech which does no more than propose a commercial transaction." *Id.* at 66, 103 S.Ct. 2875

(internal quotation marks omitted). Nevertheless, the Supreme Court concluded that the pamphlets were commercial speech:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that [the manufacturer] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.
>
> The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.

Id. at 66-67, 103 S.Ct. 2875 (citations omitted). The Court went on to say that "[a] company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Id.* at 68, 103 S.Ct. 2875. Thus, as one commentator has put it, speech is commercial under *Bolger* if: "(1) [i]t is an advertisement of some form, (2) it refers to a specific product, and (3) the speaker has an economic motivation

for the speech." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.3.7.2.

The speech affected by the petition support clause is not commercial speech under *Bolger*. A statement compelled in response to an ITC questionnaire is not an advertisement, nor does it refer to a specific product. SKF may have had "an economic motivation" for answering the questionnaire, but, as *Bolger* makes clear, "an economic motivation ... would clearly be insufficient by itself to turn [speech] into commercial speech." *Bolger*, 463 U.S. at 67, 103 S.Ct. 2875; *see also Bigelow v. Virginia*, 421 U.S. 809, 818, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) ("The State was not free of constitutional restraint merely ... because appellant's motive or the motive of the advertiser may have involved financial gain. The existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." (citations and internal quotation marks omitted)). To the contrary, SKF's response to the question "Do you support or oppose the petition?" is precisely the kind of "direct comment[ ] on public issues" for which it has "the full panoply of protections available" under the First Amendment.[5]

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5. The majority also relies on a recent case from the First Circuit that, as an alternative ground for its decision, reasoned that the transfer of data that identified which physicians had prescribed specific pharmaceuticals was commercial speech. *See* Maj. Op. at 1355 (citing *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54-55 (1st Cir.2008)). In that case, the First Circuit rejected

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Moreover, even if the majority were correct that the test for commercial speech is whether the regulated "expression relate[s] solely to the economic interests of the speaker and its audience," Maj. Op. at 1355, I cannot agree that this test is satisfied here. The majority reasons that "[r]ewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function, in this particular context assisting in the enforcement of government policy in litigation." *Id.* The majority's analysis, however, does not actually address the speech at issue. The petition support clause conditions receipt of funds on expressing support for an antidumping petition. The question is whether *that* regulated expression—namely, expressing support for an antidumping petition—"relate[s] solely to the economic interests of the speaker and its audience." The majority's view that companies who support a petition are more likely to provide assistance to the government and therefore enter into a quasi-

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a "narrower definition of commercial speech limited to activities 'propos[ing] a commercial transaction,' "—and instead reasoned that the data transfer at issue "at most embod[ied] expression related solely to the economic interest of the speaker and its audience." *IMS*, 550 F.3d. at 54. The *IMS* case plainly involved the sale of data—i.e., a commercial transaction that involved payment for the supposed "speech," which the court reasoned was actually not speech at all, but rather conduct. *Id.* To the extent that the majority concludes that *IMS* stands for the broader proposition that any speech that involves the "economic interests of the speaker" is commercial speech, I respectfully submit that either the majority's reading of *IMS* is incorrect, or *IMS* was incorrectly decided.

contractual relationship is immaterial. The issue is simply whether the expression of support itself relates solely to the economic interests of the company and the audience. Even setting aside whether a statement of support for a petition reflects the economic interests of the company making a statement, it cannot be said that the petition support requirement relates solely to the economic interest of the audience—here, the ITC. The ITC had no economic interest in whether SKF expressed support for the petition or did not. Thus, I cannot agree that the majority's "commercial contract" analogy, even if correct, would support application of the commercial speech doctrine under *Central Hudson*.

Further, it is noteworthy that the majority's view that the commercial speech test "seems appropriate" is not a view shared by any party to this case. Nowhere in any of its briefing does either the government or the ITC argue that the commercial speech doctrine is applicable. Moreover, appellant Timken expressly argues that the commercial speech doctrine is *not* applicable. *See* Response—Reply Br. of Defendant-Appellant Timken U.S. Corporation at 41 n. 48 ("Providing factual information to the ITC bears no resemblance to the concept of commercial speech, and, by definition, the [Byrd Amendment] does not involve the regulation of commercial speech, which has generally been defined as 'speech proposing a commercial transaction.' "). I agree with the parties that the commercial speech doctrine is inapplicable.

Fifth, even if the majority were correct that *Central Hudson*'s test for the constitutionality of commercial speech were the correct test, I cannot agree with the

majority that the petition support requirement would survive that test. In *Central Hudson*, the Supreme Court held that:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. Even assuming that the other elements of the *Central Hudson* test could be met, the petition support requirement cannot satisfy the final element, because it cannot be said to be "not more extensive than is necessary to serve [the asserted] interest." *Id.*

If, as the majority reasons, the government interest furthered by the petition support requirement is "to reward injured parties who assisted government enforcement" in antidumping investigations, Maj. Op. at 1352, then the petition support requirement is far more extensive than is necessary to serve that interest. A much more straightforward method of ensuring the cooperation of private parties in antidumping investigations would be simply for the ITC to compel the cooperation of uncooperative parties through the subpoena process—as

it already has the authority to do. *See* 19 U.S.C. § 1333(a), (f). Moreover, to the extent that Congress intended to compensate parties for the expense of preparing petitions or questionnaire responses as the majority suggests, *see* Maj. Op. at 1358-59, it could simply authorize reimbursement of reasonably incurred expenses to parties that cooperate willingly—a far less restrictive measure than precluding petition opponents from receiving any remedial duties. Reasoning that *Central Hudson* does not require a perfect fit between means and ends, the majority argues that "[t]hose who support antidumping petitions typically fill out questionnaires from the ITC." *Id.* at 1358. But the majority ignores that all *recipients* of questionnaires are *required* to complete them—whether they support or oppose the petition. Indeed, by definition, a party excluded from receiving disbursements as a result of checking the "Oppose" box in response to questionnaire question I-3 has *necessarily* filled out the questionnaire. While *Central Hudson* may not require a perfect correspondence of means and ends, I cannot agree that the petition support requirement places is "not more extensive than necessary" to the furtherance of an alleged interest in rewarding cooperation in an antidumping investigation.[6]

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6. The majority questions my seeming failure to explain why an even narrower construction of the Byrd Amendment—"limiting the rewards to petitioners alone"—would not meet the final requirement of the *Central Hudson* test. *See* Maj. Op. at 1357 n. 35. Because the majority does not adopt this narrower construction, the significance of the majority's criticism is not clear. In any event, as discussed in detail below, I disagree that limiting distributions to petitioners alone would cure the First Amendment problem. *See infra* at 1357-58.

Even if the interest served by the petition support requirement were the interest identified by the government—namely, "provid[ing] a separate monetary remedy to a subset of domestic producers that were the most seriously injured by foreign unfair trade practices," Br. of Defendant-Appellant U.S. Customs & Border Protection at 20-21—I would still conclude that it fails to satisfy the final element of the *Central Hudson* test. It may be true that a party that is more seriously injured by dumping is more likely to check the "Support" box in response to question I-3 than a party that is less seriously injured. But *Central Hudson* requires more: that the regulation be not more extensive than necessary.

If the government interest is to compensate the most seriously injured domestic producers, the ITC could look to the detailed financial data provided in response to the rest of the questionnaire, determine for itself which producers are most seriously injured, and distribute collected duties accordingly. Because these better proxies exist (and, in fact, are already part of the questionnaire), the government is wrong to assert that a company's response to question I-3 places a burden on speech that is not more extensive than necessary to accomplish its goal of compensating the most seriously injured producers.

Not only is the petition support requirement not the best proxy for injury, it is not even a particularly good one. As the Court of International Trade found, "there are a multitude of reasons why an entity might decide to support, oppose, or take no position in an antidumping investigation" that are unrelated to the seriousness of its injury. *SKF USA Inc. v. United States*, 451 F.Supp.2d 1355,

1362 (Ct. Int'l Trade 2006). A domestic company, like SKF, that is a subsidiary of a foreign importer, might oppose a petition because it concludes that the worldwide injury caused to its parent by an antidumping duty order would be greater that the injury that the subsidiary suffers domestically as a result of dumping. More altruistically, a company might simply have the ideological view that any restrictions on trade—including restrictions on dumping—are bad. It might be willing to endure serious injury resulting from dumping, rather than support a petition that would, in its view, restrict free trade. Finally, as was the case with amicus Giorgio Foods, Inc., a domestic producer might oppose a petition to protect business relationships in foreign countries having nothing to do with the domestic market, or it might decline to support a petition for fear of retaliation in export markets. *See* Br. of Amicus Curiae Giorgio Foods, Inc. & PS Chez Sidney LLC at 2, 9-10. To conclude summarily, as the government does, that the petition support requirement identifies the most seriously injured domestic producers evinces a naive view of the economics of international trade. Thus, I cannot conclude that the final element of the *Central Hudson* test would be met, applying either the majority's or the government's asserted government interest.[7]

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7. In a footnote, the majority asserts an alternative basis for affirmance: "[e]ven if we apply the test for speech combined with conduct in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for reasons that are clear from the text the Byrd Amendment would still be constitutional." Maj. Op. at 1355 n. 28. I respectfully disagree. For the same reasons that it cannot satisfy *Central Hudson*'s "not more

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Sixth and finally, the majority's analogy to qui tam actions is simply inapposite. The primary federal qui tam statute is the False Claims Act, 31 U.S.C. §§ 3729-33. Under § 3730(b) of the False Claims Act, a private person may bring an action in the name of the government against a defendant believed to have knowingly presented a false or fraudulent claim for payment to the government. If the defendant is proven to have presented a false claim, the defendant is liable to the government, and the private party who initiated the action may receive up to a thirty percent share of the proceeds of the action or settlement, and reasonable expenses, costs, and attorneys fees. *Id.* § 3730(d). *See generally Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 122-23, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003) (describing qui tam provisions of False Claims Act). Qui tam actions for false patent marking work in the same way. *See* 35 U.S.C. § 292(b) ("Any person may sue for the penalty [of $500 per offense for falsely marking an article as patented or 'patent pending'], in which event one-half shall go to the person suing and the other to the use of the United States.").

The majority analogizes antidumping proceedings to qui tam actions, reasoning that the operation of the Byrd Amendment, like a qui tam proceeding, "reward[s] private parties for successfully bringing suit on behalf of the

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extensive than is necessary" requirement, the Byrd Amendment cannot meet *O'Brien*'s requirement that any "incidental restriction on alleged First Amendment freedoms [be] no greater than essential to the furtherance of [the government's asserted] interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

government." Maj. Op. at 1356. It carries this analogy further, arguing that "SKF here undertook a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case" by opposing the antidumping petition. *Id.* at 1358-59. To be sure, Commerce and the ITC rely on private companies—namely, members of the domestic industry that have been harmed by dumping—to bring dumping to its attention through the petition process. But beyond that, the analogy to qui tam proceedings fails. In a qui tam case, the defendant has committed a violation of the law that causes harm to the government, and the government shares its recovery with the plaintiff—an uninjured third party. In other words, a qui tam action is an action by a representative (the plaintiff) against a wrongdoer (the defendant), on behalf of a victim (the government).

By contrast, when a foreign company improperly dumps goods in the domestic market, the foreign company is the wrongdoer, and its victims are the members of the domestic industry. A petitioner brings an action on behalf of the injured domestic industry. Thus, an antidumping action by petition is an action by a representative (the petitioner) against a wrongdoer (the foreign company), on behalf of victims (the members of the domestic industry). In summary form:

Appendix A

	Representative	Wrongdoer		Victim
Qui tam	Plaintiff	v. Defendant	on behalf of	Government
Antidumping investigation	Petitioner	v. Foreign company	on behalf of	Domestic industry

Two obvious distinctions are apparent. First, in qui tam proceedings it is the government—the victim—that willingly elects to share a portion of its compensation with the uninjured plaintiff representative, essentially as a bounty for bringing the action. But in an antidumping investigation, the government is not the injured party. It is the members of the domestic industry—not only including the petitioner and petition supporters, but also including all other domestic producers—that are injured and entitled to compensation for its injury.

Second, the majority is wrong to equate SKF to a defendant in a qui tam action. The defendant in a qui tam action is the wrongdoer—the company that violates the law. In an antidumping investigation, the role of the qui tam defendant is played by the foreign company that does the dumping. SKF was a victim of that dumping as one of the injured members of the domestic industry. In sum, the majority's analogy to qui tam proceedings is simply inapposite, and it cannot shield the petition support requirement from First Amendment scrutiny. The government recognized as much at oral argument, remarking that "[t]he parties seem to be in agreement that this statute and the classification is really not that similar to the situation of [plaintiffs] in qui tam cases." Oral Arg. at 1:03:42-1:04:36.

Appendix A

III

In my view, the petition support requirement should be subjected to strict scrutiny as a content-based restriction on political speech in a public forum. The principles that control the outcome of this case are beyond serious dispute. First, "a *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny. Thus, [the government must] show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Second, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (citation omitted). Third, under the so-called "unconstitutional conditions" doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Taken together, these principles establish—at an absolute minimum—that a regulation is subject to strict scrutiny if it denies a benefit on the basis of expression

of a specific viewpoint on a political matter in a public forum. *Cf. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409-10 (6th Cir.1999) (holding that ordinance that "grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue" was subject to strict scrutiny). I would conclude that the petition support requirement denies a benefit on the basis of expression of a viewpoint on a political matter in a public forum, and is therefore subject to strict scrutiny.

First, in my view, the petition support requirement is viewpoint discriminatory. Under the petition support requirement, a domestic company is ineligible for a distribution unless the company was in "support of the petition," as indicated by its response to question I-3, "Do you support or oppose the petition?" 19 U.S.C. § 1675c(b)(1)(A); *Producers' Questionnaire* at 2. Domestic companies who express the viewpoint that an antidumping order should issue are eligible; companies who do not express that viewpoint are not. This is classic viewpoint discrimination. As discussed in detail above, *see supra* at 9, it is immaterial that the government does not intend to suppress a particular viewpoint. It is the viewpoint-discriminatory *effect* of the statute that offends the First Amendment.

Second, the petition support requirement affects political speech. "Political speech, of course, is 'at the core of what the First Amendment is designed to protect.' " *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct.

2618, 2626, 168 L.Ed.2d 290 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)). Moreover, political speech is not merely advocacy on behalf of a particular candidate. Rather, it encompasses "the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). In this case, the petition support requirement requires that a domestic company have expressed the view that a duty should be imposed on a specific class of foreign goods, based in part on whether the domestic industry has been or will be "materially injured." *See* 19 U.S.C. § 1673. Notably, not only does the ITC consider the views of opponents when deciding whether the material injury requirement has been met, but § 1673 actually precludes a petition from going forward unless it has support from 25% of the domestic industry by production, and no more than 50% in opposition. *See* 19 U.S.C. § 1673 a(c)(4)(A)(i)-(ii). Taking a position on this question before the ITC—the body charged with determining whether there has been or will be material injury—is therefore not only political speech on an issue of public concern, but effectively a vote on whether the petition should go forward. It is therefore plainly political speech at the core of the First Amendment's protection.

For the same reasons that it affects political speech, the petition support requirement implicates the First Amendment's Petition Clause. As the Supreme Court has explained:

> The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 2 Otto 542, 92 U.S. 542, 23 L.Ed. 588 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.*, at 552. And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. 1 Annals of Cong. 738 (1789).

McDonald v. Smith, 472 U.S. 479, 482, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). By conditioning receipt of a benefit on the expression of a particular view to the governmental agency charged with making a decision, the petition support requirement necessarily impedes companies from "communicat[ing] their will" to the relevant government officials.

Third, the petition support requirement affects speech in a designated public forum. The government creates a designated public forum when it makes a space "generally available to a certain class of speakers."

Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). The ITC not only creates a designated public forum for domestic producers by inviting them to share their views on a petition, but it in fact *requires* them to do so. *See* 19 U.S.C. § 1333(a), (f); *Producers' Questionnaire* at 1. Moreover, the petition support requirement requires both that the domestic producer support the petition, and that it allow its support to be publicly known. *See* 19 U.S.C. § 1675c(d) (requiring publication of qualified recipients of distributions). I would conclude in these circumstances that an ITC proceeding is a limited public forum for speech by domestic producers.

We are, of course, not the first court of appeals to consider the constitutionality of a government regulation that provides a benefit to a party as a reward for prior political expression. The closest analogous case in the regional circuits is the Sixth Circuit's decision in *Lac Vieux*, 172 F.3d 397, *appeal after remand* 276 F.3d 876 (6th Cir.2002), *cert. denied*, 536 U.S. 923, 122 S.Ct. 2589, 153 L.Ed.2d 779 (2002). In that case, two casino developers had spent substantial sums of money to advertise and promote the passage of a ballot initiative to legalize casino gambling in Detroit, Michigan. *Id.* at 400. After the ballot measure passed, the Detroit City Council adopted an ordinance giving preference for casino licenses to developers who had actively promoted the ballot initiative. *Id.* at 401. The Lac Vieux Desert Band of Lake Superior Chippewa Indians—a potential casino developer that had not lobbied for passage of the ballot initiative but wanted a casino license—challenged

the ordinance on First Amendment grounds. *Id.* at 402. The Sixth Circuit held that the ordinance "impose[d] a burden based on the content of political speech" and that the ordinance was content based and therefore subject to strict scrutiny. *Id.* at 409-10.

The majority dismisses *Lac Vieux* in a footnote, reasoning that it "did not reward the achievement of the enforcement of government policy through litigation, but instead involved 'political support' for legislative efforts." Maj. Op. at 1356 n. 32. I agree that an ITC investigation is not an election by ballot initiative, but I do not think that this distinction is of any significance. "[T]he free discussion of governmental affairs" protected by the First Amendment encompasses more than merely campaigning. *Mills*, 384 U.S. at 218, 86 S.Ct. 1434. Moreover, because the ITC requires domestic producers to provide their views on a petition and is required to take those views into account, the petition support requirement, like the ordinance in *Lac Vieux*, does concern a company's "political support" for a proposition (as in *Lac Vieux*) or a petition (as in this case).

I would conclude that because the petition support requirement is viewpoint discriminatory toward political speech in a public forum, it is subject to strict scrutiny. To survive, it must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45, 103 S.Ct. 948. Even assuming that the interests asserted by the majority (reward for assistance) and the government (remedy for

the most seriously injured domestic producers) were compelling, I cannot conclude that the petition support requirement is narrowly drawn to achieve either. As discussed in detail above, less restrictive means exist to achieve either interest. *See supra* at 23-26. I would therefore conclude that the petition support requirement is unconstitutional.

IV

Because I would affirm the judgment of the Court of International Trade that the petition support requirement is unconstitutional,[8] I briefly address the remaining issues concerning severance and SKF's amended certification.

A. Severance

"[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it valid."

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8. I agree with the majority's conclusion that, if the Byrd Amendment were subject to rational basis review under the Equal Protection Clause, it would survive—though I do so for different reasons. Though the petition support requirement is not a good proxy for the seriousness of a domestic producer's injury, I would not conclude, as the Court of International Trade did, that it is an *irrational* proxy. I would therefore affirm the judgment of the Court of International Trade solely on the alternative basis that the petition support requirement violates the First Amendment.

El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 96, 30 S.Ct. 21, 54 L.Ed. 106 (1909). Timken argues that even if the petition support requirement is unconstitutional, the Court of International Trade erred by severing the statute so that opponents of a petition were eligible for benefits. Instead, Timken contends that the statute should be severed so that only petitioners—not any other "interested part[ies] in support of the petition"—would be eligible for distributions.

There are two problems with Timken's proposed approach. First, it would run contrary to Congress's intent, clear from the face of the statute, to distribute collected duties to "affected domestic producers." "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' " *Ayotte v. Planned Parenthood*, 546 U.S. 320, 330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Califano v. Westcott*, 443 U.S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (Powell, J., concurring in part and dissenting in part)). Here, Congress's intent is clear from the overall structure of the Byrd Amendment. The Byrd Amendment authorizes distributions to "affected domestic producers." 19 U.S.C. §§ 1675c(b)-(d). The petition support requirement is only one of several parts of the definition of "affected domestic producers"—an "affected domestic producer" must also be a "manufacturer, producer, farmer, rancher or worker representative (including associations of such person)" and must "remain[ ] in operation." *Id.* § 1675c(b)(1). Additionally, a producer that has "ceased the production

of the product covered by the order or finding" is excluded from the statutory definition of "affected domestic producer." *Id.*

Plainly, Congress intended to distribute funds collected as a result of antidumping duty orders to more "affected domestic producers" than simply the petitioner who initiated the action. If Congress had intended to limit distributions to petitioners, the statute simply would have authorized distributions to "petitioners." There would be no need for an elaborate definition of "affected domestic producer," with its various requirements and exclusions. Congress's intent therefore must necessarily have been not to reward petitioners for assistance, but to provide a monetary remedy to injured members of the domestic injury, to offset the injuries caused by dumping. In fact, the very title of the Byrd Amendment—the Continued Dumping and Subsidy *Offset* Act of 2000—evinces to this purpose. *See also* 145 Cong. Rec. S497, 497 (1999) (statement of Sen. DeWine) ("Current law also does not contain a mechanism to help injured U.S. industries recover from the harmful effects of foreign dumping and subsidization."). It would be inconsistent with this intent to remedy the constitutional defects in the Byrd Amendment by limiting recovery to petitioners.

The second problem with Timken's approach is that it would not actually cure the First Amendment defect of the petition support requirement. Notably, Timken made its severance argument in the context of a finding by the Court of International Trade that the petition

support requirement violated the Equal Protection Clause because it was not rationally related to a legitimate government purpose. While it might be true that limiting distributions to petitioners only—rather than petitioners and parties that supported the petition—might cure any problem that the petition support requirement had overcoming the rational basis test, the statute would still fail strict scrutiny under the First Amendment, even if severed as Timken proposed, because it would still condition the receipt of funds on expression of a political viewpoint and petitioning activity—namely, filing a petition that argues that an antidumping duty order should enter. Moreover, the statute would still fail strict scrutiny, because less restrictive means are available to serve the interests identified by the majority (reward for assistance) and the government (remedy for the most seriously injured domestic producers). Thus, I would conclude that the Court of International Trade properly severed the Byrd Amendment by removing the petition support requirement.

B. SKF's Cross Appeal

SKF argues on cross appeal that the Court of International Trade was wrong to hold that Customs was not required to accept SKF's amended certification for fiscal year 2005 distributions under the Byrd Amendment. Customs rejected SKF's amended certification as untimely. "[T]his court reviews the trial court's decision *de novo*, reapplying the same standard utilized by that court"—here, the standard of review

under the Administrative Procedure Act. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1004 (Fed.Cir.2003). Under the Administrative Procedure Act:

> The reviewing court shall— . . . hold unlawful and set aside agency action, findings, and conclusions found to be
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (D) without observance of procedure required by law; [or]
> >
> > (E) unsupported by substantial evidence. . . .

5 U.S.C. § 706 (2006).

The timing of certifications pursuant to the Byrd Amendment is governed by Treasury regulations. "At least 90 days before the end of a fiscal year, Customs will publish in the Federal Register a notice of intention to distribute assessed duties received as the continued

dumping and subsidy offset for that fiscal year." 19 C.F.R. § 159.62(a). That notice contains instructions for filing a certification to claim a distribution. *Id.* § 159.62(b)(2). "In order to obtain a distribution of the offset, each affected domestic producer must submit a certification . . . that must be received *within 60 days* after the date of publication of the notice in the Federal Register, indicating that the affected domestic producer desires to receive a distribution. The certification must enumerate the qualifying expenditures incurred by the domestic producer since the issuance of an order or finding for which a distribution has not previously been made. . . ." *Id.* § 159.63(a) (emphasis added).

SKF admits that the certification that it submitted within the sixty-day time frame contained expenditure data only for a one manufacturing facility. It did not seek to amend its certification until after the Court of International Trade held that the petition support requirement was unconstitutional. SKF admits that its amended certification was untimely, but argues in essence that submitting a complete certification would have been futile, because "it was a foregone conclusion that Customs would reject SKF['s] certification." Br. of Plaintiff-Cross Appellant SKF USA Inc. at 67. It further argues that its failure to submit a complete certification was harmless.

I disagree. Plainly, SKF's certification was *not* futile, because the Court of International Trade, reviewing Customs's rejection of the certification, held that the Byrd Amendment was unconstitutional and, as a result,

that Customs should not have rejected SKF's certification. If SKF believed when it filed its certification that its challenge to the constitutionality of the Byrd Amendment was worth consideration by Customs, the Court of International Trade, and this court, then SKF should have expended its own time and effort to provide a complete and timely certification for all of its expenses. I would affirm Customs's refusal to accept SKF's amended certification under the Administrative Procedure Act's standard of review.

* * *

For the foregoing reasons, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING REHEARING AND REHEARING EN BANC (WITH DISSENT), DATED SEPTEMBER 29, 2009

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 2008-1005, 2008-1006, 2008-1007, 2008-1008

SKF USA, INC.,

Plaintiff-Cross Appellant,

v.

UNITED STATES CUSTOMS
AND BORDER PROTECTION,

Defendant-Appellant,

and

United States International Trade Commission,

Defendant-Appellant,

and

Timken U.S. Corporation,

Defendant-Appellant,

and

Appendix B

United States, Robert C. Bonner, Commissioner, United States Customs and Border Protection, And Daniel R. Pearson, Chairman, United States International Trade Commission,

Defendants.

Sept. 29, 2009

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges, and STEARNS, District Judge.*

ORDER

PER CURIAM.

A petition for rehearing en banc was filed by the Cross Appellant, and a response thereto was invited by the court and filed by the Appellants. The court granted the motions of Giorgio Foods, Inc. and PS Chez Sidney LLC, Koyo Corporation of U.S.A., NSK Corporation, and American Furniture Manufacturers Committee for Legal Trade and Micron Technology, Inc. for leave to file briefs as amici curiae. The petition for rehearing was referred to the panel that heard the appeal, and

* Honorable Richard G. Stearns, District Judge, United States District Court for the District of Massachusetts, sitting by designation, was on the original panel, and participated only in the decision of the petition for panel rehearing.

thereafter the petition for rehearing en banc, responses, and the amici curiae briefs were referred to the circuit judges who are in regular active service. A poll whether to rehear the appeal en banc was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is denied.

(3) The mandate of the court will issue on October 6, 2009. FOR THE

LINN, Circuit Judge, with whom NEWMAN, RADER and MOORE, Circuit Judges, join, dissents from the denial of the petition for rehearing en banc.

LINN, Circuit Judge, with whom NEWMAN, RADER, and MOORE, Circuit Judges, join, dissenting from the denial of the petition for rehearing en banc.

Because the Byrd Amendment's "petition support" requirement regulates political speech in violation of the First Amendment, and because the panel's decision relies on a novel, and in my opinion flawed, analytic framework in sustaining that requirement, I respectfully dissent from the court's decision not to rehear this case en banc.

Appendix B

The so-called "petition support requirement" of the Byrd Amendment requires that a company publicly express "support of the petition" to be eligible to receive any funds collected as a result of the order. 19 U.S.C. § 1675c(b)(1)(A) (2000) (repealed 2006). Under the petition support requirement, if a domestic company publicly expresses the viewpoint that the government should impose a tariff on an importer, then the domestic company is eligible to receive some part of that tariff. If the domestic company either expresses the viewpoint that a tariff should not be imposed or takes no public position, it is not eligible. The statute thus restricts political speech and petitioning activity and implicates the First Amendment.

The majority opinion invokes the doctrine of constitutional avoidance to "construe" the "purpose" of the challenged statute to avoid applying strict scrutiny review to this statute under the First Amendment. But the avoidance doctrine "is a tool for choosing between competing plausible interpretations of a statutory text," *Clark v. Martinez*, 543 U.S. 371, 381, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), not *1342 inventing a hypothetical purpose for a statute, *cf. Fisherman's Harvest, Inc. v. PBS & J*, 490 F.3d 1371, 1377 (Fed.Cir.2007) (discussing "canon of constitutional avoidance in statutory interpretation"). Because there is no statutory construction dispute here, the doctrine is inapplicable.**

** The government contends in its petition brief that the panel majority's opinion construed the text of the Byrd Amendment to limit payments to supporters who expended resources in "actively

(Cont'd)

The majority finds that the purpose of the statute was "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or

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(Cont'd)

supporting" the petition. Def.-Appellant United States Customs and Border Protection Resp. to Pet. for Reh'g En Banc 2. But this is not what the opinion actually says. The majority based its analysis almost entirely on the construction of the *purpose* of the Byrd Amendment, then-in dicta-stated that "if we were to view this case as involving the construction of statutory language rather than an exercise in ascertaining statutory purpose, the result would be the same." *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1353 (Fed.Cir.2009) (emphasis added). The only reference to a construction of the statute is in footnote 26, which does not actually limit the statute. It says:

> [W]e construe the Byrd Amendment's language providing for payments to a "petitioner or interested party in support of the petition" to only permit distributions to those who actively supported the petition (i.e., a party that did no more than submit a bare statement that it was a supporter without answering questionnaires or otherwise actively participating would not receive distributions).

Id. at 1354 n. 26. While "actively supported" seems, facially, to limit the petition support requirement, the parenthetical makes clear that this is not a limitation at all. It only excludes "a party that did no more than submit a bare statement that it was a supporter without answering questionnaires." *Id.* In fact, all members of the domestic industry, whether they support or oppose the petition, are *required* to complete questionnaires. *See* 19 U.S.C. § 1333(a); *see also U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire, at 1*, available at http://www.usitc.gov/trade_remedy/documents/USProducerQuestionnaire. pdf.

supporting antidumping proceedings." *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1352 (Fed.Cir.2009). There are two fundamental problems with this "reward for assistance" rationale (apart from the fact that the government did not assert it in its original briefs and disclaimed it at oral argument). First, the "reward for assistance" rationale assumes that the government has a strong interest in imposing an antidumping duty order. That is, it assumes that the government's interest is in an investigation that results in a finding of dumping and a finding that a duty order must be imposed. But, as the government acknowledges, the government's interest is in a fair antidumping investigation, not in an antidumping investigation that necessarily results in a duty order. Def.-Appellant United States Customs and Border Protection Resp. to Pet. for Reh'g En Banc 11. The majority assumes that only those parties that provide information and argument in support of a duty order are assisting the government, but in fact, all participants in an investigation—whether they support or oppose the entry of a duty order—are assisting the government in reaching the *right* result.

Second, the "reward for assistance" purpose ignores the fact that all members of the affected domestic industry are *required* to submit questionnaire responses, and the International Trade Commission can issue subpoenas to obtain any information that it needs. *See* 19 U.S.C. § 1333(a), (f) (2006) (authorizing International Trade Commission to request information, issue subpoenas, and demand statements under oath);

see also U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire, at 1, available at http:// www. usit c.gov/ trade_remedy/731_ad_701_cvd/investigations/ question/ USProducerQuestionnaire.pdf ("This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession") There is no need to provide a reward for assistance that those in the affected domestic industry *must* provide.

The majority held that "[r]ewarding parties under the circumstances here" was "similar to commercially contracting with them" and then concluded that the commercial speech test "seem[ed] appropriate." *SKF*, 556 F.3d at 1355. The most significant problem with this analysis is that it creates a whole new category of speech-speech in circumstances that are "similar to" commercial speech-and it subjects that speech to much less rigorous scrutiny under the First Amendment than it would otherwise receive.

The negative consequences of this new exception should not be understated. Under the Supreme Court's traditional analysis, the First Amendment has required strict scrutiny of content-based restrictions on political speech in a public forum. *See, e.g., Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (holding that content-based restrictions on political speech in public forum must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948,

74 L.Ed.2d 794 (1983))); *cf. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409-10 (6th Cir.1999) (holding that ordinance that "grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue" was subject to strict scrutiny). What the *SKF* opinion does is to use the purpose it created to establish a new and ambiguous exception: speech in circumstances that are sufficiently similar to commercial speech (but are not actually commercial speech), such that the commercial speech test "seems appropriate." *SKF*, 556 F.3d at 1354. Opening up this kind of exception should not be done lightly, nor should it be done without clearly defining when the exception is applicable.

In my opinion, the petition support requirement is an unconstitutional viewpoint-discriminatory restriction on political speech and petitioning activity that cannot survive strict scrutiny. Although the Byrd Amendment was repealed in 2006, "[t]he impact of the panel's decision is far reaching. Forty-one cases pertaining to the [Byrd Amendment] are currently stayed before the CIT. As of October 1, 2008, more than $1 billion remained in Customs Clearing Accounts awaiting future distribution." Pl.-Cross Appellant Pet. for Reh'g En Banc 4-5 (citation omitted). This case is simply too important to allow the majority's incorrect First Amendment analysis to stand. For these reasons, I respectfully dissent from the court's denial of the petition to rehear this case en banc.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE, DATED JULY 26, 2007

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 07-116
Court No. 05-00542

SKF USA INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, United States Customs and Border Protection, Robert C. Bonner (Commissioner, United States Customs and Border Protection), United States International Trade Commission, and Stephen Koplan (Chairman, United States International Trade Commission),

Defendants,

and

Timken U.S. Corporation,

Defendant-Intervenor.

July 26, 2007

Appendix C

OPINION

TSOUCALAS, Senior Judge.

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000).

II. Standard of Review

As set out in the Administrative Procedure Act ("APA")[1] this Court "will set aside Customs' denial of offset distribution only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1354 (Fed.Cir.2006)(quoting *Candle Corp. of America v. U.S. Int'l Trade Comm'n*, 374 F.3d 1087, 1091 (Fed.Cir.2004)(citing 5 U.S.C. § 706 (2000))).

III. Background

On September 12, 2006, this Court issued an order directing the United States International Trade Commission ("ITC" or "Commission") and the Bureau

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1. The provisions of subchapter II and chapter seven of title five of the United States Code were originally enacted on June 11, 1946, and are popularly known as the Administrative Procedure Act. It has been amended since. *See* 5 U.S.C. §§ 551-559, 701-706.

of Customs and Border Protection ("Customs")[2], to "re-examine their decision to deny SKF [Continued Dumping and Subsidy Offset Act of 2000] disbursements for the 2005 fiscal year in accordance with" this Court's decision in *SKF USA Inc. v. United States* (" *SKF USA* "), __ CIT __, 451 F.Supp.2d 1355 (2006). On December 8, 2006, Customs filed its remand determination. *See Reconsideration of the Fiscal Year 2005 CDSOA Certification of SKF USA, Inc.* ("*Customs' Reconsideration*"), December 8, 2006.[3] On December 11, 2006, the ITC filed its remand determination. *See* Letter from Patrick V. Gallagher, Jr., ITC, to the Honorable Tina Potuto Kimble, Clerk of the Court (Dec. 11, 2006) ("*ITC Remand Determination*"). On January 10, 2007, SKF USA Inc. ("SKF" or "Plaintiff") and Defendant-Intervenor, Timken U.S. Corp. ("Timken") filed their comments upon the remand results. *See* Pl.'s Comments on Remand Determinations Issued By Def.

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2. The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed.Reg. 20,131 (April 23, 2007).

3. Though the ITC issued its remand in the form of a letter to the Honorable Tina Potuto Kimble, Clerk of the Court, CIT, on December 11, 2006, the ITC did previously advise Customs of the results. *See Custom's Remand Determination* at 1 ("The ITC has informed [Customs] that SKF has been added to its list of potential affected producers for Bearings from Japan . . . for fiscal year 2005.").

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United States Customs and Border Protection and Defendant United States International Trade Commission ("SKF Comm.") at 10; Defendant-Intervenor's Comments on the Remand Results ("Timken Comm.") at 4.

In its remand, the ITC determined that SKF "did participate in the original investigation by questionnaire response and the company is eligible, using the definitions announced in [*SKF USA*], to be placed on the list prepared by the [ITC] under the Byrd Amendment for the order covering ball bearings from Japan." ITC *Remand Determination* at 2. As such, the ITC "revised the Byrd Amendment list for the antidumping duty order on ball bearings from Japan to include" SKF. *Id.* at 2.

In its remand, Customs stated:

> In its July 13, 2005, certification, SKF sought a disbursement in the amount of its total qualifying expenditures, $115,033,000.00. Including SKF's certification, the total qualifying expenditures submitted by affected domestic producers for Commerce Case No. A-588-804[4] would have been $3,873,340,322.67.

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4. Commerce determined that there were sales at less-than-fair value resulting in an antidumping duty order. *See Antidumping Duty Orders for Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, Inv. No. A-588-804, 54 Fed.Reg. 20,904 (Dep't

(Cont'd)

Appendix C

> A total of $47,810,802.17 was available for distribution to affected domestic producers in this Commerce Case. In accordance with 19 U.S.C. § 1675c(d)(3) and 19 C.F.R. § 159.64(c)(2), affected domestic producers would only be entitled to receive a pro rata share of the available funds because the total qualifying expenditures certified exceeds the amount available for distribution. SKF's certified qualifying expenditures represent 2.9699% of the total qualifying expenditures for this Commerce Case No. A-588-804.
>
> If, after all opportunities for rehearing and/or appeal have been exhausted, [*SKF USA*] is the final court decision upon this action, SKF would receive a distribution for up to $1,419,933.01 in CDSOA funds for fiscal year 2005, to the extent these funds are either recoverable from the affected domestic producers who initially received them or are available. . . .

Custom's Remand Determination at 1-2.

(Cont'd)

Commerce May 15, 1989). Following the enactment of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), the ITC provided Customs with a list of entities (*i.e.* manufacturer, producer, farmer, rancher, or worker representative) eligible as "affected domestic producers," on which SKF was not originally included. *See SKF USA*, —CIT at ——, 451 F.Supp.2d at 1358.

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On January 10, 2007, SKF filed comments to both the *ITC Remand Determination* and *Customs' Reconsideration* with this Court. *See* SKF Comm. at 10. Comments were also submitted by Timken on the same day. *See* Timken Comm. at 4. Rebuttal comments were submitted by the ITC, Customs and Timken on January 30, 2007. *See* Def. U.S. International Trade Commission's Response to Pl.'s Comments on the Commission's Remand Determination ("ITC's Reb.") at 1-9; Response to Comments Upon Remand Results ("Customs' Reb.") at 16; Rebuttal Comments of Timken U.S. Corporation to SKF USA's Comments on the Remand Results ("Timken's Reb.") at 15.

IV. Discussion

A. Contentions of the Parties

1. SKF's Contentions

SKF agreed with the final results of both *Customs' Reconsideration* and the *ITC Remand Determination* (collectively, the "Remand Determinations") to the extent that both Customs and the ITC (collectively, the "Defendants") now find that SKF is eligible to be placed on the list of "affected domestic producers" and is as such eligible to receive distributions under 19 U.S.C. § 1675c. *See* Pl.'s Comm. at 2. SKF, however, objects to the ITC having "only revised the CDSOA 'affected domestic producer' list to include [SKF] for the antidumping duty order on ball bearings from Japan." *Id.* at 3.

SKF stresses that "the investigation in which the [ITC] noted that [SKF] participated was not limited to Japan, but covered ball bearings from nine countries." *Id.* at 3. SKF further contends that this Court's decision in SKF "with regard to the ITC was limited only as to fiscal year 2005. It was not limited as to country." *Id.* at 4. Furthermore, SKF contends that a determination that SKF is eligible for disbursements under all outstanding ball bearing orders would be consistent with SKF's last request for relief, which requested that this Court:

> issue an order severing from the antidumping law, those provisions of 19 U.S.C. 1675c . . . that limit eligibility for disbursements to only those domestic producers that support antidumping petitions and declaring those provisions unconstitutional, null and void, and issue an order declaring that [SKF] is entitled to be considered for distribution of a proportionate share of CDSOA disbursements for fiscal year 2005.

Id. at 5 (citing to Am. Complaint at 17, ¶ 4).

SKF further argues that as Customs relied solely on SKF's July 13, 2005 certification, Customs thereby failed to consider the amended certification for Japan, as well as other certifications. *See id.* at 6. SKF specifically raises Customs' refusal to consider an amended certification for disbursements under the antidumping order against ball bearings from Japan, as well as certifications for seven other countries, which

SKF filed with Customs on September 28, 2006. *Id.* at 6. SKF contends that this "refusal to use the amended certification to calculate [SKF' s] proportional share of disbursements is unsupportable." *Id.* at 6.

2. ITC's Contentions

The ITC contends that when "SKF filed its appeal in October 2005, [SKF] made clear that it was challenging only the two agency's actions relating to its requests for Byrd Amendment distributions for the Japanese order." ITC Reb. at 2; (citing to Complaint, ¶¶ 7, 15). The ITC stresses that SKF's claim "reflects a not particularly subtle attempt to broaden the scope of [SKF' s] appeal and the nature of the Court's decision on this matter." *Id.* at 4.

The ITC stresses that the scope of the Court's review in the case at bar " 'is confined to the record developed before the agency[.]' " *Id.* at 5 (citing to *Ammex, Inc. v. United States*, __ CIT __, 341 F.Supp.2d 1308, 1311 (2004)). Thus, the ITC argues, "the decisions subject to this appeal are *only* the [ITC's] and Customs' denial of [SKF's] requests to be declared eligible for Byrd distributions relating to the Japanese ball bearings order for fiscal year 2005." *Id.* at 5. The ITC further stresses that "at no point in [the] administrative process did [SKF] even suggest that the [ITC] or Customs had been mistaken in interpreting their requests as relating only to the Japanese ball bearings order." *Id.* at 6. Additionally, the ITC argues that SKF had previously made it clear that it was its intent to challenge the actions

of Customs and the ITC in denying its request under the Japanese ball bearing order, and that SKF only challenged the actions of the Defendants in connection with the disbursement of funds collected under an antidumping order on ball bearings from Japan. *See id.* at 6 (citing to Complaint at ¶ 7). The ITC concludes by contending that this Court's opinion in *SKF USA* did not indicate that the ITC or Customs "should go beyond the scope of their underlying determinations and this appeal by making a new set of decisions as to whether [SKF] was entitled to receive Byrd distributions under any order than the order covering Japan." *Id.* at 7.

3. Timken's Contentions

Timken initially disagreed with the decision in *SKF USA*, in which this Court declared that the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") violates the Equal Protection Clause. *See* Timken Br. at 1-2. Though "Timken disagrees with the Court's conclusions and reserves its right to appeal, Timken believes the determinations of the ITC and [Customs] are consistent with the opinion of the Court[.]" Timken Br. at 3. Timken, however, contends that Customs has made a ministerial error by certifying SKF's qualifying expenditures to 2.9699%, thereby entitling SKF to receive $1,419,933.01 of the $47,810,802.17 available for distribution. *See id.* at 3. Timken argues that Customs had previously rounded the allocation percentage to the billionth decimal place, and not the ten thousandth, as is indicated above. *See id.* (citing to *FY 2005 CDSOA Annual Disbursement Report*). Timken surmises that

SKF's "correct allocation percentage should be 2.969865553% and the distribution [SKF] would potentially receive from the total available, $47,810,802.17, would be up to $1,419,916.54." *Id.*

Additionally, Timken contends that SKF's comments on the remand determinations are not responsive to the remand results and should thus be rejected. See Timken's Reb. at 2. Timken states that an agency's "determination 'will be upheld as long as the Court can reasonably discern how the agency arrived at the decision' as long as it is 'in accordance with law.' " *Id.* at 2; (citing to *Cathedral Candle Co. v. United States*, 27 CIT 1541, __, 285 F.Supp.2d 1371, 1375 (2003)).

Timken contends that both Customs and the ITC correctly limited their determinations on remand to the question of SKF eligibility for CDSOA distribution with respect to the antidumping order on ball bearings from Japan alone, as SKF only sought eligibility for and distribution to the antidumping duty order on ball bearings from Japan. *Id.* at 2-3. Timken asserts that in the case at bar judicial review of agency determinations must be based on all the documents before the agency at the time of determination. *See id.* at 3. Timken further asserts that the full record of documents used by both Customs and the ITC indicates that SKF "referred only to the Japan ball bearings order in requesting agency action." *Id.* at 4. As such, Timken assert that both the ITC and Customs remand determinations were consistent with this Court's remand instructions from *SKF USA*, 30 CIT at __, 451 F.Supp.2d at 1367. *See id.* at 6.

Timken further argues that even if SKF's "new certification covering seven additional orders and qualifying expenditures of $8,164,858,000 could have been considered on remand [Customs] would not have been required to accept certifications filed over a year too late on September 28, 2006, contrary to the statutory and regulatory deadlines governing FY2005 certifications and distributions." *Id.* at 8. Timken stresses that "in order to receive CDSOA distributions for FY2005, Custom's regulations required eligible affected domestic producers to file certifications . . . by August 1, 2005." *Id.* at 9 (citing to 19 C.F.R. § 159.63(a); 70 Fed.Reg. 31,566 (June 1, 2005)). Timken concludes by contending that in *SKF USA* this Court stated that it entrusted Customs to determine how SKF receives its pro rata share of the FY2005 CDSOA disbursements, and Customs' action since the decision have complied with this Court's instructions. *See id.* at 15 (citing to *SKF USA*, — CIT at ——, 451 F.Supp.2d at 1366).

4. Customs' Contentions

Customs begins its contentions by agreeing with Timken's argument that SKF's CDSOA distribution was miscalculated through a ministerial error. *See* Customs' Reb. at 3. Customs asserts that it initially erred in calculating the allotted SKF distribution at 2.9699%, as opposed to the proper 2.969865553% allocation. *See id.* Accordingly, Customs requests that this Court "grant a remand to Customs for the limited purpose of correcting a ministerial error in its calculation of the CDSOA distribution SKF will be entitled to pursuant to [*SKF*

USA], if [*SKF USA*] remains the final Court decision after all appeals have been exhausted." *See id.* at 4.

Despite the above request for recalculation, Customs asserts that both Customs and the ITC complied with *SKF USA* when they issued their remand results. *See id.* Customs argues that when reviewing whether Customs' or the ITC's interpretation and application of the CDSOA are in accordance with law, courts apply the standard of review set forth in the APA. *See id.* at 6. Customs further argues that in the APA context:

> an action must meet two requirements to be "final" pursuant to 5 U.S.C. § 704:(1) "the action must mark the 'consummation' of the agency's decision making process," *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Id.* at 178, 117 S.Ct. 1154. Because SKF only challenged the ITC's administrative determination not to add SKF to the ADP list with respect to the ball bearings from Japan antidumping investigation, the ITC has not taken any administrative action with respect to other antidumping or countervailing duty orders. Thus, there is no other action which is subject to review because neither of the requirements established in the case law are met. *See Lujan*

v. National Wildlife Federation, 497 U.S. 871, 882, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

Customs' Reb. at 7-8. Customs asserts that in the case at bar there can be no "consummation" of the decision making process as Customs has not yet made a decision upon whether to apply its overpayment provision and as there is no decision for this Court to review. *See id.* at 14. Customs asserts that a decision not to take enforcement action is immune from judicial review pursuant to 5 U.S.C. § 701(a)(2). *See id.*

Customs further contends that it complied with this Court's order in *SKF USA*, and did not err in neglecting to consider SKF's September 28, 2006 submission to the ITC in determining SKF's entitlement to CDSOA distributions as SKF was untimely in filing the materials. *See id.* at 9-11. Customs asserts that "all CDSOA certifications were due to be filed within 60 days of Customs' July 3, 2005 publication of *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed.Reg. 44,722." *Id.* at 10-11. Customs then further asserts that if SKF believed its certification contained incorrect figures, it had ten days after Customs issued its July 15, 2005 notification denying SKF certification within which to correct that certification. *Id.* at 11 (citing to 19 C.F.R. § 159.63(c)). Based on all the above arguments, Customs concludes that this Court should maintain its ruling entrusting Customs "to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit, understanding that Customs has regulatory

authority at its disposal to redistribute the disbursed funds, such as 19 C.F.R. § 159.64(b)(3)." *Id.* at 15 (citing to *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1366).

B. Analysis

1. Customs' Calculation Error in Calculating the Offset Distribution Amount Is *De Minimis* in Nature and Thus Does Not Warrant a Remand.

As stated *supra*, Timken contends that SKF's "correct allocation percentage should be 2.969865553% and the distribution [SKF] would potentially receive from the total available, $47,810,802.17, would be up to $1,419,916.54." Timken's Comm. at 3. The Government has confirmed that "Customs' remand determination contains a ministerial error in the calculation of the CDSOA distribution SKF would be entitled to receive pursuant to [*SKF USA*]." Customs' Reb. at 3. The Government further requests that "the Court grant a remand to Customs for the limited purpose of correcting a ministerial error in its calculation of the CDSOA distribution SKF will be entitled to pursuant to [*SKF USA.*]" *Id.* at 4.

The remand, however, if granted, would lead to an adjustment of a mere $16.47. Despite the Government's admission of an administrative error on the part of Customs, this Court finds that the error was *de minimis* in nature and that a remand would be a waste of time, effort, and taxpayers' funds.

2. Customs' and the ITC's Remand Determinations Fully Comply with *SKF USA*.

In an APA action, such as the case at bar, courts "shall compel agency action" which is "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1)(2000). "[A]gency action includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13) (2000). This Court only possesses jurisdiction to entertain challenges to administrative actions. *See* 28 U.S.C. 1581(i)(2000). In *SKF USA*, this Court remanded the present matter "to the ITC and Customs to review their decisions denying SKF CDSOA disbursements[.]" *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1367.

In *SKF USA*, SKF requested that this Court "issue a permanent injunction enjoining the Government from making any present or future disbursements pursuant to the CDSOA with respect to duties collected from all antidumping orders covering AFBs[5], or in the alternative, just ball bearings *from Japan.*" *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1363 (emphasis added). As such, SKF further requested that this Court "order Customs to require repayment of all CDSOA funds disbursed with respect to all antidumping orders

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5. AFBs are defined as "antifriction bearings, other than tapered roller bearings and parts thereof" in *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1357.

covering AFBs, or in the alternative, just ball bearings *from Japan* [.]" *Id.* (emphasis added).

Furthermore, in a letter dated July 13, 2005, SKF's attorneys requested that Customs distribute CDSOA offsets for Fiscal Year 2005 for offsets "resulting from the antidumping order on ball bearings from Japan." Letter to the Assistant Commissioner of Customs (July 13, 2005). SKF's Counsel therein attached a Continued Dumping and Subsidy Offset Certification, which clearly listed the case name as "Ball Bearings from Japan." *Id.* SKF's Complaint of October 3, 2005 makes specific references to disbursements "pursuant to the CDSOA of assessed fiscal year 2005 funds pertaining to ball bearings from Japan." Complaint at p. 16. SKF additionally raises its "request for disbursement of funds and Customs' disbursement of funds collected under the antidumping order on ball bearings from Japan before December 1, 2005[.]" Complaint ¶ 15. These assertions were later put forth in SKF's amended complaint of January 3, 2006, where SKF states that it challenges the actions of both the ITC and Customs, pursuant to 19 U.S.C. 1675c, "in connection with the disbursements of funds collected under an antidumping order on ball bearings from Japan." Amended Complaint, ¶ 7. It is thereby clear to this Court that SKF was initially seeking repayment of all CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan, and only from Japan.

Appendix C

As a result of this Court's decision in *SKF USA*, both the ITC and Customs filed their remand determinations. *See Customs' Reconsideration; ITC Remand Determination.* As SKF only challenged the ITC's decision not to add SKF to the list of affected domestic producers list with respect to the ball bearings from Japan antidumping investigation, the ITC did not take any administrative action with respect to other antidumping or countervailing duty orders. *See ITC Remand Determination.* As such, Customs' remand determination dealt solely with the antidumping duty order on ball bearings from Japan as well. *See Customs' Reconsideration.* By solely referencing the antidumping duty order on ball bearings from Japan both the ITC and Customs complied with this Court's decision in *SKF USA*.

As stated *supra*, under 28 U.S.C. § 1581(i) this Court only possesses jurisdiction to entertain challenges to administrative actions. This Court remanded "this matter to the ITC and Customs to review *their decision* denying SKF CDSOA disbursements in accordance with" the *SKF USA* opinion. *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1367 (emphasis added). Both the ITC and Customs properly kept their remands within the scope of "the antidumping order on ball bearings from Japan." Letter to the Assistant Commissioner of Customs (July 13, 2005). Furthermore, this Court has stated that it "entrusts Customs to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit[.]" *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1366. Nothing in Customs'

remand determination makes the Court regret such a lawful entrustment. *See SKF USA*, __ CIT at __, 451 F.Supp.2d at 1366 (citing to 19 C.F.R. § 159.64(b)(3)).

3. Customs Did Not Err in Refusing to Consider SKF's filings of September 28, 2006.

As stated *supra*, SKF claims that Customs erred in refusing to consider an amended filing made on September 28, 2006 for disbursements under the antidumping order against ball bearing from Japan, which also included certifications for seven other countries. Pl.'s Comm. at 6.

Pursuant to statute, Customs must publish a notice of intent to distribute ("Notice of Intent to Distribute") at least 30 days before making CDSOA distributions. *See* 19 U.S.C. § 1675c (d)(2) (2000). After publication of the Notice of Intent to Distribute, Customs' regulations state that claimants, such as SKF, have 60 days in which to file certification to obtain a CDSOA distribution. *See* 19 C.F.R. § 159.63(a). The timely filing of certifications is important as the "distribution of funds from duties assessed each fiscal year must be distributed not later than 60 days after the end of that fiscal year." *Cathedral Candle Co. v. United States International Trade Comm'n*, 400 F.3d 1352, 1358 (quoting 19 U.S.C. § 1675c(c)).

As per the above analysis, CDSOA certifications in the case at bar were due to be filed within 60 days of

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Customs' July 3, 2005 publication of *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed.Reg. 44,722. As September 28, 2006 is more than 60 days after July 3, 2005, SKF failed to timely file its amended certification, and Customs thereby did not err in its refusal to consider said documentation.

C. Conclusion

Upon review of the record and the arguments presented by the parties on remand, the *Remand Determinations* are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

JUDGMENT

This Court, having received and reviewed the Bureau of Customs and Border Protection's ("Customs") *Reconsideration of the Fiscal Year 2005 CDSOA Certification of SKF USA, Inc.* ("*Customs' Reconsideration*") filed on December 8, 2006, the remand determination filed by the United States International Trade Commission ("ITC") on December 11, 2006 ("*ITC Remand Determination*") (*Customs' Reconsideration* and the *ITC Remand Determination*, collectively, the "*Remand Determinations*"), comments and rebuttal comments of SKF USA Inc., Timken U.S. Corporation, Customs and the ITC, and all other papers filed herein, holds that both Customs and the ITC duly complied with this Court's remand order in *SKF USA Inc. v. United States*, __ CIT __, 451 F.Supp.2d 1355 (2006), and it is hereby

ORDERED that the *Remand Determinations* are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE, DATED SEPTEMBER 12, 2006

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 06-139.
Court No. 05-00542.

Sept. 12, 2006.

SKF USA INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, United States Customs and Border Protection, Robert C. Bonner (Commissioner, United States Customs and Border Protection), United States International Trade Commission, and Stephen Koplan (Chairman, United States International Trade Commission),

Defendants,

and

Timken U.S. Corporation,

Defendant-Intervenor.

Appendix D

OPINION

TSOUCALAS, Senior Judge.

Plaintiff, SKF USA Inc. ("SKF"), moves pursuant to USCIT R. 56.1 for summary judgment on the agency record challenging Defendants, the Bureau of Customs and Border Protection's ("Customs' ") and the International Trade Commission's ("ITC's") (collectively, the "Government's") determination that SKF is not an "affected domestic producer" under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") and thus not eligible to receive CDSOA distributions. SKF specifically challenges the constitutionality of the CDSOA on First Amendment, Due Process and Equal Protection grounds. The Government responds that the CDSOA is constitutional and that it correctly denied SKF "affected domestic producer" status. Defendant-Intervenor, Timken U.S. Corporation ("Timken") also responds that the CDSOA is constitutional and that SKF is not entitled to any relief.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000).

STANDARD OF REVIEW

In matters arising under 28 U.S.C. § 1581(i), the Court will review the matter as provided in 5 U.S.C.

§ 706. *See* 28 U.S.C. § 2640(e). Under the Administrative Procedures Act, *i.e.* Title 5 of the United States Code, the Court "shall . . . interpret constitutional and statutory provisions . . .". 5 U.S.C. § 706. The Court reviews the constitutionality of a statute *de novo*. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1357 (Fed.Cir.2000).

Under a R. 56.1 motion for judgment upon the agency record, the Court is reviewing an agency's decision based on the facts in the administrative record. *See* USCIT R. 56.1. In addition, an agency's determination must be "in accordance with law." 5 U.S.C. § 706(2)(A). Finally, while persuasive and informative, the Court is not bound by decisions of parallel courts. *See e.g., Corus Group PLC v. Bush*, 26 CIT 937, 939 n. 4, 217 F.Supp.2d 1347, 1350 n. 4 (2002).

STATUTORY BACKGROUND

In 2000, Congress amended Title VII of the Tariff Act of 1930 by adding section 754, the CDSOA, commonly known as the Byrd Amendment. *See* Pub.L. No. 106-387, § 1001 *et. seq.*, 114 Stat. 1549A-72 to 75 (2000), codified as 19 U.S.C. § 1675c (2000). Under the CDSOA, Customs collects duties pursuant to antidumping duty orders and places the monies in special accounts within the United States Treasury. *See* 19 U.S.C. § 1675c(e). Each antidumping duty order is given its own special account. *See id.* Customs then disburses the money to certain "affected domestic producers" who have submitted a certification attesting that they have

incurred enumerated qualifying expenditures. *See* 19 U.S.C. § 1675c(b) & (d). The ITC determines which entities qualify as "affected domestic producers," as defined by the CDSOA, and forwards the list of eligible entities to Customs. *See* 19 U.S.C. § 1675c(d). An "affected domestic producer" is defined as any manufacturer, producer, farmer, rancher, or worker representative . . . that—

> (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.

19 U.S.C. § 1675c(b)(1). Disbursements are made on a yearly basis and the initial disbursements were made in 2001 based on all existing antidumping duty orders at that time. See 19 U.S.C. § 1675c(d)(3); 114 Stat. 1549A-75.

In 2006, Congress repealed the CDSOA, however, the repeal is not effective until October 1, 2007. *See* Deficit Reduction Act of 2005, Pub.L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). SKF is challenging the 2005 fiscal year CDSOA disbursements, thus, justiciable issues remain here.

Appendix D

FACTUAL BACKGROUND

The facts are undisputed and briefly included here. In 1988, Commerce initiated an antidumping investigation of antifriction bearings, other than tapered roller bearings and parts thereof, ("AFBs") from Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. *See* Br. Supp. Pl. SKF USA Inc.'s R. 56.1 Mot. J. Upon Agency R. ("SKF's Br.") at 4; Def.'s Resp. Pl.'s Mot. J. Upon Agency R. ("Customs' Resp.") at 6. The ITC also launched material injury investigations. *See id.*; Customs' Resp. at 6. SKF was an interested party and a participant in both the original Commerce and ITC investigations and indicated that it opposed the petition in its questionnaire responses. *See id.* at 5; Customs' Resp. at 6. The ITC found material injury to the domestic industry, which SKF was a part of, by reason of imports from Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* (*"USITC Pub. No. 2185"*), USITC Pub. No. 2185, Inv. Nos. 303-TA-19 & 20, 731-TA-391-399 (Final) (May 1989).[1] Commerce then determined that there were sales at less-than-fair value resulting in an antidumping duty order, which in relevant part remains in effect. *See Antidumping Duty Orders for Ball*

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1. *USITC Pub. No. 2185* is located at SKF's Br. at Ex. 5 and the ITC's final determination is published under the same name at 54 Fed.Reg. 21,488 (ITC May 18, 1989).

Appendix D

Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan, Inv. No. A-588-804, 54 Fed.Reg. 20,904 (Dep't Commerce May 15,1989). Following the enactment of the CDSOA, the ITC provided Customs with a list of entities (*i.e.* manufacturer, producer, farmer, rancher, or worker representative) eligible as "affected domestic producers," on which SKF was not included. *See* Customs' Resp. at 7.

On April 20, 2005, the ITC denied SKF's request to amend its list of eligible domestic producers to obtain CDSOA distributions with respect to duties collected pursuant to the antidumping duty order covering *USITC Pub. No. 2185. See* SKF's Br. at Ex. 1 & 2. The ITC stated that it denied SKF's request because SKF had opposed the petition in its questionnaire response in the original investigation. *See* SKF's Br. at Ex. 2. On July 13, 2005, SKF then submitted a certification to Customs requesting CDSOA disbursements in the amount of $115,033,000 for qualifying expenditures incurred. *See* SKF's Br. at Ex. 3. Customs denied SKF's claim on July 15, 2005, stating that SKF was not on the ITC list of affected domestic producers. *See* SKF's Br. at Ex. 4. This action followed.

Appendix D

DISCUSSION

I. As Applied Here, the CDSOA Violates the Equal Protection Clause

A. Parties' Contentions

SKF argues that the CDSOA is unconstitutional because it violates the Equal Protection doctrine by discriminating between similarly situated domestic producers. *See* SKF's Br. at 12. Specifically, SKF states that the CDSOA creates separate classifications for domestic producers between those that expressed support for an antidumping petition and those that did not support or took no position. *See id.* at 12-13. Only domestic producers that supported a petition are then eligible for CDSOA disbursements. *See id.* SKF advances that there is no rational basis between the classification of eligible and ineligible domestic producers and a legitimate government objective. *See id.* at 13. Furthermore, the separate classifications are unreasonable and conflict with the purpose of the antidumping law. *See id.* at 13-15. In enacting the CDSOA, SKF argues that Congress amended the antidumping law, not to alter the overall purpose of the law, but to strengthen its remedial effect. *See* Reply Br. Supp. Pl. SKF USA Inc.'s R. 56.1 Mot. J. Upon Agency R. ("SKF's Reply") at 9. SKF states that the purpose of the antidumping law is to equalize trade and prevent injury to domestic industries. *See* SKF's Br. at 14. The antidumping law, however, is not intended to aid any individual company. *See id.* Therefore, SKF reasons that

because the CDSOA benefits certain individual companies and not domestic industries as a whole, it is contrary to the overall statutory purpose. *See id.* at 15. The CDSOA also furthers no legitimate purpose in benefitting a mere subsection of a domestic industry, when the entire domestic industry is found to be injured by the ITC. *See id.* SKF argues that neither the plain language of the CDSOA nor the legislative history connects " injured domestic industries" with "petition supporting domestic companies." *Id.* at 17. Thus, SKF concludes that the CDSOA definition for "affected domestic producer" is discriminatory with no rational basis in support. *See id.* at 17-19. SKF also points out that petition-supporting producers are not the only companies that are injured domestic producers and that there is no basis in differentiating between injured domestic companies as being "more deserving" or incurring more injury than another. *See id.* at 19. Moreover, SKF states "whether a producer believes itself to be injured by reason of imports and therefore supports a petition has nothing to do with whether the ITC actually determines injury to exist for an industry." *Id.* at 21. Finally, SKF also argues that the purported purpose of the CDSOA is inconsistent with the actual results of CDSOA disbursements. *See* SKF's Reply at 10-11. SKF also argues that whereas Defendants contend that the CDSOA is a thorough and deliberated piece of legislation, in reality, the CDSOA was passed quickly without significant debate or committee review. *See id.* at 11-12. SKF reasons that such a hasty enactment hardly merits the substantial weight argued by Defendants in reviewing it. *See id.*

The Government responds that the classifications established in the CDSOA do not violate the Equal Protection Clause. *See* Customs' Resp. at 18.[2] As an economic policy decision, the Government argues that the CDSOA is rationally related to a legitimate government purpose and thus must be affirmed. *See id.* at 19. The Government also argues that SKF's argument that the CDSOA conflicts with the antidumping law is unsupported. *See id.* at 19-20. Rather, the Government asserts that the CDSOA enhances the antidumping statute's remedial nature. *See id.* at 20. The Government contends that the requirement in the CDSOA that a producer support an antidumping petition to then be eligible for funds is rational. *See id.* at 21. Since the method in the CDSOA is a "rough accommodation" for achieving the purpose of helping the domestic industry, the Government asserts it must stand. *See id.* at 22. The Government argues that the "affected domestic producer" requirements are a "logical, objective, and efficient method for Congress to further its rational policy of strengthening remedies for unfair trade conditions by compensating those who are being most harmed by injurious dumping." *Id.* at 23. Moreover, the Government maintains that the CDSOA meets the overall goals of "restoring free trade and remedying the ill-affects of foreign dumping and subsidization. . . ." *Id.* at 24. Thus, under the broad

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2. The International Trade Commission's response brief states its "full support for the arguments made by" Customs. *See* Def. United States Int'l Trade Comm'n's Resp. Pl.'s Mot. J. Upon Agency R. at 1.

rational basis review of statutes in the areas of social and economic policy, the Government contends the CDSOA is constitutional. *See id.* at 24.

Timken also responds that under a rational basis review, the CDSOA does not violate the Equal Protection Clause. *See* Resp. Br. Timken U.S. Corp. SKF USA's Br. Supp. Its Mot. J. Agency R. ("Timken's Resp.") at 7. Timken argues that SKF, not the Government, has the burden to illustrate that there is no rational basis for the CDSOA, which SKF failed to demonstrate. *See id.* at 8-9. Moreover, since the CDSOA is a statute involving economic policy scrutinized under the rational basis standard, it is reviewed with judicial restraint. *See id.* at 9. Thus, Timken argues that it is at least debatable "whether collected antidumping and countervailing duties ought to be distributed to some producers and not others. . . ." *Id.* at 10. Timken states that the cases cited by SKF to support a heightened scrutiny to be applied here are cases involving classifications based on sexual orientation, disability and legitimacy, all inapposite to matters of economic policy. *See id.* Timken further argues that the CDSOA's eligibility requirement is reasonable and rationally related to a legitimate government purpose. *See id.* at 13-16. Timken advances that Congress has rationally provided for a separate definition of "affected domestic producers," which is distinct from the injured industry protected by the antidumping statute. *See id.* at 15-16. Timken reasons that Congress could rationally conclude that producers who supported a petition are affected by continued dumping in a way that other producers

are not. *See id.* at 16. Thus, the classification in the CDSOA is rationally based and the statute should be affirmed. *See id.*

B. Analysis

Congress has the authority to enact the CDSOA under the broad authority granted by either the Spending Clause or the Commerce Clause of the Constitution. It is the constitutional limits to that authority and the scope of those limits where the CDSOA fails constitutional muster. The Fourteenth Amendment to the Constitution of the United States provides, *inter alia*, that no state shall deny any person the "equal protection of the laws." CONSTITUTION Amend. XIV. Known as the Equal Protection Clause, the Supreme Court has held *1439 that it applies to the federal government pursuant to the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

1. Standard of Review Under the Equal Protection Clause

In the CDSOA, Congress has drawn a distinction between entities who may be "affected domestic producers" based on whether the entity supported the original antidumping petition or either did not support or took no position in the petition. *See* 19 U.S.C. § 1675c(b)(1) ("a petitioner or interested party in support of the petition"). As the CDSOA is applied here, similarly situated entities, *i.e.* SKF and Timken, are treated

differently and thus, do not stand equal before the law. In areas of social and economic policy, however, a "statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld" against an Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (citations omitted). As such, the Court must review the CDSOA under this rational basis standard. Even under a rational basis review, however, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law". *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (Stevens, J., concurring). In addition, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole [antidumping] Act." *NTN Bearing Corp. of Am. v. United States*, 26 CIT-53, 102-03, 186 F.Supp.2d 1257, 1303 (2002) (citations omitted). Rather, "each part or section of a statute should be construed

in connection with every other part or section so as to produce a harmonious whole...." *Id.* (citing *In re Nantucket, Inc.*, 677 F.2d 95, 98 (Cust. & Pat.App.1982)).

2. No Rational Basis for Classification in CDSOA

The Trade Agreements Act of 1979 added the countervailing and antidumping duty provisions to the Tariff Act of 1930. *See* Pub.L. No. 96-39, § 101, 93 Stat. 150 (1979). In enacting the Trade Agreements Act of 1979, Congress stated that the purposes were to, *inter alia*, "foster the growth and maintenance of an open world trading system" and "to expand opportunities for the commerce of the United States in international trade." Pub.L. No. 96-39, § 1, 93 Stat. 146, codified as 19 U.S.C. § 2502. In 2000, Congress again amended the Tariff Act of 1930 adding the CDSOA. *See* Pub.L. No. 106-387, § 1003, 114 Stat. 1549A-73 (2000). In enacting the CDSOA, Congress made the following findings:

> (1) . . . injurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized.
>
> . . . . .
>
> (4) Where dumping or subsidization continues, *domestic producers* will be reluctant to reinvest or rehire . . .
>
> (5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

114 Stat. 1549A-72 to 73 (emphasis added). The purpose of the antidumping law, as a whole, has always been to "equalize competitive conditions between foreign exporters and domestic *industries* affected by dumping." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1379 (Fed.Cir.2003) (emphasis added); *see, e.g., Or. Steel Mills Inc. v. United States*, 862 F.2d 1541, 1545 (Fed.Cir.1988) ("the purpose of an antidumping duty order is to aid an industry, not an individual company . . .").

The Court based on the record before it, the statutory language and the legislative history, cannot find a rational basis nor is able to find any conceivable basis for the classification-distinguishing between those entities who supported a petition and those who either took no position or opposed the petition-and the purpose of the CDSOA. The antidumping statute is designed to ensure that domestic *industries*, not any individual *company* can compete in the marketplace. *See Or. Steel Mills*, 862 F.2d at 1545. Congress itself has defined the term "industry" as "producers as a whole of a domestic like product . . ." in charging the ITC to determine whether a domestic industry is injured by reason of imports. 19 U.S.C. § 1677(4)(A). To make a distinction between individual producers within an industry is incongruous with the fundamental purpose of the antidumping statute, that is to remedy the injurious affects of dumping to the domestic *industry as a whole.* Furthermore, Congress stated that the CDSOA was enacted to counter the continued dumping and subsidies affecting competition in the marketplace and to further

effectively neutralize the injury to the domestic industries. *See* 114 Stat. 1549A-72 to 73.

The Government and Timken argue that Congress has made a policy choice in determining that entities who supported an antidumping petition are those most harmed by injurious dumping. *See* Customs' Resp. at 23; Timken's Resp. at 15-16. The Court finds this argument unpersuasive. The plain language of the CDSOA fails to rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry. Even if, however, in passing the CDSOA Congress intended to help entities that suffered more injury than others, the Court cannot find a connection between that purpose and then to identify the gravely injured as only the ones who supported an antidumping petition. Importantly, there are three options an entity can take in an antidumping investigation: 1) support the petition, 2) oppose the petition, and 3) take no position. *See PS Chez Sidney, L.L.C. v. United States*, 30 CIT __, __, 442 F.Supp.2d 1329, 1337-39 (Wallach, J. July 13, 2006). The Court cannot discern a reasonable correlation between an entity's decision to support a petition and the gravity of the entity's injury. The classification is simply too broad because there are a multitude of reasons why an entity might decide to support, oppose, or take no position in an antidumping investigation. While the Court acknowledges that an overbroad statute may survive rational basis scrutiny, the breadth cannot

brush upon reasons that can conceivably infringe upon other constitutional protections, for example an expression of political belief on an antidumping petition. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Again, the focus of an antidumping investigation is whether the domestic industry, as a whole, is being injured, not just the petition supporters. *See* 19 U.S.C. § 1677(4)(A); *Or. Steel Mills*, 862 F.2d at 1545.

Furthermore, the legislative history of both the Trade Agreements Act of 1979 and the CDSOA emphasize the purpose of remediation of injury caused by dumping and subsidies to the entire domestic industry. *See e.g.*, H. Rep. No. 96-317 at 44 (1979) ("antidumping duties may be imposed . . . when an industry in the importing country producing a like product is materially injured"); S.Rep. No. 96-249 at 16 (1979) ("ITC determines that an industry in the United States is materially injured"). Most relevantly, Congress states as part of its Congressional findings preceding the CDSOA that "injurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized" and that "[w]here dumping or subsidization continues, *domestic producers* will be reluctant to reinvest or rehire . . ." so therefore, the "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." 114 Stat. 1549A-72 to 73 (emphasis added). Congress refers to the domestic industry and domestic producers in the CDSOA, as Congress has done consistently throughout the antidumping law, without preference or bias to only

those entities that supported an antidumping petition. The CDSOA is an amendment to the Tariff Act of 1930 and should be read in congruity with the other provisions therein. *See NTN Bearing Corp.*, 26 CIT at 102-03, 186 F.Supp.2d at 1303. Inclusive in the purpose of the entire antidumping statute, *i.e.* Tariff Act of 1930 with the amendments of the Trade Agreements Act of 1979 and the CDSOA, is the remedy of injury to the domestic industry. *See e.g., Or. Steel Mills*, 862 F.2d at 1545.

Here, SKF and Timken are both members of the domestic AFB industry. *See USITC Pub. No. 2185* at 42. Both entities participated in the original antidumping investigation in 1988, with SKF opposing the petition and Torrington supporting it. *See* Corrected Admin. R. at Ex. 1 & 2. In the investigation, the ITC concluded that the entire domestic AFB industry was materially injured by reason of imports from multiple countries, including Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed.Reg. at 21,488-89. Timken is classified as an "affected domestic producer" and received CDSOA disbursements only because it acquired Torrington in 2003. *See* SKF's Reply at 25. SKF submitted a request to the ITC to be included on the "affected domestic producer" list for the 2005 CDSOA disbursements. *See* SKF's Br. at Ex. 1. SKF also submitted a claim listing its qualifying expenditures for CDSOA disbursements to Customs. *See* SKF's Br. at Ex. 3. Both agencies denied SKF's request stating only

that SKF was not an "affected domestic producer" because it did not support the original 1988 antidumping petition. *See* SKF's Br. at Ex. 2 & 4. As the CDSOA is applied here, SKF is not receiving Equal Protection under the laws because it is treated differently than a similarly situated party, *i.e.* Timken, on the sole basis of expressing opposition to an antidumping petition. For the aforementioned reasons, such a classification is arbitrary and is not rationally connected to any legitimate objective. Therefore, the CDSOA, specifically the provision which defines "affected domestic producer," is unconstitutional as applied here. Having found that the CDSOA is unconstitutional, the Court finds it unnecessary to address SKF's other constitutional challenges and proceeds to remedies.

II. Remedies

A. Parties' Contentions

SKF requests that the Court issue a permanent injunction enjoining the Government from making any present or future disbursements pursuant to the CDSOA with respect to duties collected from all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan. *See* SKF's Br. at 40. SKF also requests that the Court order Customs to require repayment of all CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan and deposited in the general treasury. *See id.* SKF argues that a balancing of the four factors required for a permanent

injunction support its issuance. *See* SKF's Reply at 13. SKF asserts that it has suffered irreparable economic harm to its competitive position as a result of being denied CDSOA disbursements while its competition received the funds. *See id.* at 14. SKF also asserts that the balancing of hardships weigh in its favor and that the public interest would be served by a permanent injunction. *See id.* at 16-18. SKF further argues that the Court has the authority to order Customs to recollect disbursed CDSOA monies under 19 C.F.R. § 159.64(b)(3). *See* SKF's Reply at 18. SKF points out that the Government's current position is contrary to its assurances to the Court when it argued against SKF's preliminary injunction motion. *See id.* at 18-19. Furthermore, inapposite to the Government's arguments, SKF argues that there is no discretionary agency action at issue here. *See id.* at 19. Rather, SKF is asking the Court to order Customs to seek repayment of unconstitutional disbursements. *See id.* Moreover, Customs' regulations indicate that it anticipates that it is required to seek repayment if an overpayment has been made as determined by court action. *See id.* at 20. SKF also asserts that severing the statute as suggested by Timken will not remedy SKF's injury. *See id.* at 21. Rather, SKF advances that its constitutional harms could be remedied if the CDSOA read so that all domestic producers were eligible for disbursements as "affected domestic producers," *i.e.*, severing both 19 U.S.C. § 1675c(b)(1)(A) & (d)(1). *See id.* at 22-23. Finally, SKF argues that Timken's doctrine of laches defense is without merit and does not bar its claim. *See id.* at 23-25.

The Government responds that SKF has not met the burden necessary for a permanent injunction and also inappropriately requests an order compelling agency enforcement. *See* Customs' Resp. at 45. Of the four factors enumerated by the Supreme Court for a permanent injunction, the Government argues that SKF has not demonstrated that it will be irreparably injured and that the public interest would be served. *See id.* at 45-47. The Government states that it has the authority to redistribute CDSOA funds that are found to be improperly distributed, which removes SKF's irreparable injury claim. *See id.* at 46. Therefore, a permanent injunction would be inappropriate. *See id.* at 47. The Government also argues that the Court is not empowered to order Customs to initiate collection of disbursed CDSOA monies. *See id.* Such an order, the Government asserts, is an intrusion upon agency discretion and an attempt by Customs to recoup CDSOA distributions "would require Customs to *enforce* its overpayment regulation and, thus, be an enforcement action." *Id.* (emphasis retained). Since the APA governs this matter, the Government states that only action legally required can be compelled of the agency. *See id.* at 47-48 (citing 5 U.S.C. § 706(1)). The Government states that Customs' enforcement regulation, 19 C.F.R. § 159.64(b), is a discretionary regulation. *See id.* at 50-52. Therefore, the Government argues that it is premature for the Court to order it to compel disgorgement because it has not yet made a decision as to whether or not to enforce 19 C.F.R. § 159.64(b), thus there is no agency decision for judicial review. *See id.* Furthermore, the Government argues that the CDSOA

does not place an affirmative obligation upon it to initiate an enforcement action, thus the Court has no basis upon which to order Customs to do so. *See id.* at 52. Finally, the Government argues that even if the Court were empowered to order Customs to take an enforcement action, there is no final agency action to enforce here. *See id.* at 52-53.

Timken also responds that SKF has failed to establish that it is entitled to any relief. *See* Timken's Resp. at 38. Timken argues that SKF has failed to rebut the presumption that any unconstitutional language can be severed from the CDSOA rather than automatically invalidating the entire statute. *See id.* at 39. Timken states that assuming the Court finds that the supporting the petition requirement is unconstitutional, that portion can be severed from the definition of "affected domestic producer." *See id.* at 40-41. In doing so, the Congressional intent behind the CDSOA is still preserved and the CDSOA is still operable. *See id.* Timken also argues that the doctrine of laches bars SKF to any forms of equitable relief. *See id.* at 42. Timken states that SKF did not challenge the constitutionality of the CDSOA in 2001, but rather unreasonably waited until after four annual CDSOA distributions had been made before filing this action. *See id.* Thus, Timken asserts that repayment of CDSOA disbursements here would prejudice the CDSOA recipients by imposing a sizeable unexpected financial burden on those entities who reasonably relied on CDSOA disbursements. *See id.* at 43. Finally, Timken argues that SKF has not demonstrated that it is entitled to restitution or

repayment, which is an equitable remedy premised in contract and inapplicable to a legislative policy choice. *See id.* at 43-44.

B. Analysis

1. The Constitutionally Offensive Language Can Be Stricken From the CDSOA

Since the definition of an "affected domestic producer" in the CDSOA is unconstitutional as applied here, the Court must determine whether the offending portions of the statute are severable or whether the entire statute is invalidated. *See Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion) ("a court should refrain from invalidating more of the statute than is necessary."); *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Supreme Court has reiterated that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96, 30 S.Ct. 21, 54 L.Ed. 106 (1909). Also material in "evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress". *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (emphasis retained). "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.*

Here, the Court finds that the offending portion of the statute is easily severable from the rest of the CDSOA and will not render the statute useless. The CDSOA defines an "affected domestic producer" as "a petitioner or interested party in *support of* the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." 19 U.S.C. § 1675c(b)(1)(A) (emphasis added). The Court has found that the classifying language, *i.e.* "support of," creates an unconstitutional distinction among similarly situated domestic producers. Therefore, the words "support of" should be stricken from the definition of an "affected domestic producer." In doing so, the Court recommends that an acceptable definition of an "affected domestic producer" should read

> (A) was a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered . . .

19 U.S.C. § 1675c(b)(1)(A)(as modified). The CDSOA would then include *all* domestic producers as eligible entities to receive CDSOA funds so long as they participated in an antidumping investigation resulting in an order. The CDSOA also refers to the "in support of" requirement in a separate subsection, 19 U.S.C. § 1675c(d)(1), when outlining the ITC's duties to forward the list of eligible "affected domestic producers" to Customs. *See* 19 U.S.C. § 1675c(d)(1). In accordance with

the aforementioned permissible definition of "affected domestic producer," the words "indicate support of" should be stricken from 19 U.S.C. § 1675c(d)(1) and replaced with "participated in" so that 19 U.S.C. § 1675c(d)(1) should read:

> The Commission shall forward to the Commissioner . . . a list of petitioners and persons with respect to each order and finding and a list of persons that *participated in* the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those *who participated in* a petition, the Commission shall consult with the administrating authority to determine the identity of the petitioner and those domestic parties. . . .

19 U.S.C. § 1675c(d)(1) (underlined portions indicating changes).

The constitutionally acceptable definition of "affected domestic producer" allows the CDSOA to function in a manner more consistent with Congress' intent to provide relief for the entire domestic industry, as expressed in its Congressional findings and with the intent and purpose behind the overall antidumping law. *See* 114 Stat. 1549A-72 to 73; *Alaska Airlines*, 480 U.S. at 685, 107 S.Ct. 1476. Congress charges the ITC to determine in an antidumping investigation whether a

domestic industry is materially injured or threatened to be injured by reason of imports of the subject merchandise. *See* 19 U.S.C. § 1673. An affirmative determination by the ITC indicates that it has determined as such. *See id.* Under the constitutionally acceptable definition of "affected domestic producer," CDSOA disbursements are now available to the entire injured domestic industry. In doing so, the CDSOA can be administered in the same way, merely without the unconstitutional classification of eligible recipients.

2. Customs and the ITC Are to Reexamine Their Negative Decision and Determine SKF's Eligibility for CDSOA Disbursements

Customs and the ITC denied SKF CDSOA disbursements for the 2005 fiscal year stating that SKF was not an "affected domestic producer," as defined in the CDSOA. *See* SKF's Br. at Ex. 2 & 4. For the foregoing reasons, the Court finds that Customs' and the ITC's determination was made under an impermissible classification. With the petition support requirement removed from the definition of "affected domestic producer," Customs' and the ITC's reason for denying SKF CDSOA disbursement would no longer exist. SKF is an eligible entity to be included on the ITC's list of "affected domestic producers" because it participated in the relevant antidumping investigation that resulted in an affirmative determination. *See* USITC Pub. No. 2185. As such, SKF's request for a permanent injunction is moot. Since the ITC and Customs denied SKF's requests solely based on the fact that SKF was not an

"affected domestic producer," the Court remands this matter back to the agencies for the ITC to first determine if SKF qualifies as an eligible "affected domestic producer" for the 2005 fiscal year CDSOA disbursements in accordance with this decision. If the ITC so determines, then Customs is to determine whether SKF's claim submitted for CDSOA disbursements is sufficient and if so, to then include SKF among the 2005 CDSOA recipients to receive its pro rata share. The Court determines that because Customs has yet to determine the sufficiency of SKF's claim, the issue of whether the Court is empowered to order Customs to disgorge CDSOA monies already paid is not yet ripe for review. Based on the administrative posture of this case, the Court hesitates to preempt any agency action here. Rather if SKF qualifies, the Court entrusts Customs to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit, understanding that Customs has regulatory authority at its disposal to redistribute the disbursed funds, such as 19 C.F.R. § 159.64(b)(3).

CONCLUSION

The Court holds that the requirement that an entity had to "support" an antidumping petition to be included as an "affected domestic producer" as defined in the CDSOA, 19 U.S.C. § 1675c(b)(1)(A), is a violation of the Equal Protection guarantees under the Fifth Amendment to the Constitution. The classification treats similarly situated domestic producers differently and is not rationally related to a legitimate government

objective. The Court further finds that the classifying language "support of" is severable from the CDSOA. Therefore, the definition of "affected domestic producer" should read as "a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." The Court finds all other arguments unpersuasive. Since SKF was denied "affected domestic producer" eligibility under the unconstitutional definition, the Court remands this matter to the ITC and Customs to review their decisions denying SKF CDSOA disbursements in accordance with this opinion. An order will be entered accordingly.

APPENDIX E — LETTER FROM U.S. CUSTOMS AND BORDER PROTECTION, DATED JULY 15, 2005

U.S. CUSTOMS AND BORDER PROTECTION

SKF USA Inc.
Attn: Mr. Timothy D. Gifford
1111 Adams Avenue
Norristown, PA 19403

Dear Mr. Gifford:

U.S. Customs and Border Protection (CBP) has completed its review of your certifications for case(s) A-588-804, which were submitted for disbursements pursuant to the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000, codified at 19 U.S.C. § 1675c (2002). Due to the reason stated below, we are denying your claims for Fiscal Year 2005 (FY 2005) disbursements.

According to the CDSOA, the U.S. International Trade Commission (ITC) is responsible for providing CBP with a list of potentially eligible affected domestic producers [hereinafter referred to as the "ITC list"]. Pursuant to 19 U.S.C. § 1675c(d)(1), the "Commission shall forward to the Commissioner . . . a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." The ITC list was published in the Federal Register on June 1, 2005, and

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SKF USA Inc. was not on the list. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31566 (June 1, 2005). Further, subsequent to the publication of the ITC list, we confirmed with the ITC that SKF USA Inc. was not on the ITC list of affected domestic producers. Therefore, CBP must deny SKF USA Inc.'s claims for FY 2005 disbursements under the CDSOA.

If you have any further questions regarding these cases, please contact Ms. Leigh Redelman at (317) 614-4462.

Sincerely,

s/ Leigh Redelman
for W. David Sims
Branch Chief, Revenue Division

APPENDIX F — LETTER FROM UNITED STATES INTERNATIONAL TRADE COMMISSION, DATED APRIL 20, 2005

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, DC 20436

April 20, 2005

Herbert C. Shelley
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, DC 20036

Re: Your March 24, 2005 Request for a Revision of the Commission's List of Petitioners and other Entities Supporting Petition–Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan[1]

Dear Mr. Shelley:

The Commission does not concur with your request that your client, SKF USA, Inc., be added to the list of firms expressing public support for the petition in the investigation on antifriction bearings from Japan, because your client had indicated that it opposed the petition in its questionnaire response in the original

1. Commission investigation No. 731-TA-394-A-B-C; Commerce investigation No. A-588-804.

investigation. The Continued Dumping and Subsidy Offset Act allows for adding only those potentially eligible producers that indicated support of the petition by letter or through questionnaire response during the original investigation. 19 U.S.C. § 1675e(d)(1).

Sincerely,

s/ Stephen Koplan
Stephen Koplan

APPENDIX G — CONTINUED DUMPING AND OFFSET ACT OF 2000, PUB. L. NO. 106-387, TITLE X, 114 STAT. 1549A-72 (2000)

TITLE X—CONTINUED DUMPING AND SUBSIDY OFFSET

SEC. 1001. SHORT TITLE.

This title may be cited as the 'Continued Dumping and Subsidy Offset Act of 2000'.

SEC. 1002. FINDINGS OF CONGRESS.

Congress makes the following findings:

(1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.

(2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.

(3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.

(4) Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.

(5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

SEC. 1003. AMENDMENTS TO THE TARIFF ACT OF 1930.

(a) IN GENERAL—Title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) is amended by inserting after section 753 following new section:

'SEC. 754. CONTINUED DUMPING AND SUBSIDY OFFSET.

'(a) IN GENERAL—Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the 'continued dumping and subsidy offset'.

'(b) DEFINITIONS—As used in this section:

'(1) AFFECTED DOMESTIC PRODUCER- The term 'affected domestic producer' means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—

'(A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and

'(B) remains in operation.

Companies, businesses, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.

'(2) COMMISSIONER—The term 'Commissioner' means the Commissioner of Customs.

(3) COMMISSION—The term 'Commission' means the United States International Trade Commission.

(4) QUALIFYING EXPENDITURE—The term 'qualifying expenditure' means an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order in any of the following categories:

'(A) Manufacturing facilities.

'(B) Equipment.

'(C) Research and development.

'(D) Personnel training.

'(E) Acquisition of technology.

'(F) Health care benefits to employees paid for by the employer.

'(G) Pension benefits to employees paid for by the employer.

'(H) Environmental equipment, training, or technology.

'(I) Acquisition of raw materials and other inputs.

'(J) Working capital or other funds needed to maintain production.

'(5) RELATED TO—A company, business, or person shall be considered to be 'related to' another company, business, or person if—

'(A) the company, business, or person directly or indirectly controls or is controlled by the other company, business, or person,

'(B) a third party directly or indirectly controls both companies, businesses, or persons,

'(C) both companies, businesses, or persons directly or indirectly control a third party and there is reason to believe that the relationship causes the first company, business, or persons to act differently than a nonrelated party.

For purposes of this paragraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.

'(c) DISTRIBUTION PROCEDURES—The Commissioner shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section. Such distribution shall be made not later than 60 days after the first day of a fiscal year from duties assessed during the preceding fiscal year.

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(d) PARTIES ELIGIBLE FOR DISTRIBUTION OF ANTIDUMPING AND COUNTERVAILING DUTIES ASSESSED—

'(1) LIST OF AFFECTED DOMESTIC PRODUCERS—The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 751.

'(2) PUBLICATION OF LIST; CERTIFICATION—The Commissioner shall publish in the Federal Register at least 30 days before the distribution of a continued dumping and subsidy offset, a notice of intention to

distribute the offset and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under paragraph (1). The Commissioner shall request a certification from each potentially eligible affected domestic producer—

'(A) that the producer desires to receive a distribution;

'(B) that the producer is eligible to receive the distribution as an affected domestic producer; and

'(C) the qualifying expenditures incurred by the producer since the issuance of the order or finding for which distribution under this section has not previously been made.

'(3) DISTRIBUTION OF FUNDS—The Commissioner shall distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2). The distributions shall be made on a pro rata basis based on new and remaining qualifying expenditures.

'(e) SPECIAL ACCOUNTS—

'(1) ESTABLISHMENTS—Within 14 days after the effective date of this section, with respect to antidumping duty orders and findings and countervailing duty orders notified under subsection (d)(1), and within 14 days after the date an antidumping duty order or finding or countervailing duty order issued after the effective date takes effect, the Commissioner shall establish in the Treasury of the United States a special account with respect to each such order or finding.

'(2) DEPOSITS INTO ACCOUNTS—The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including interest earned on such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

'(3) TIME AND MANNER OF DISTRIBUTIONS—Consistent with the requirements of subsections (c) and (d), the Commissioner shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made.

'(4) TERMINATION—A special account shall terminate after—

'(A) the order or finding with respect to which the account was established has terminated;

'(B) all entries relating to the order or finding are liquidated and duties assessed collected;

'(C) the Commissioner has provided notice and a final opportunity to obtain distribution pursuant to subsection (c); and

'(D) 90 days has elapsed from the date of the notice described in subparagraph (C).

Amounts not claimed within 90 days of the date of the notice described in subparagraph (C), shall be deposited intc the general fund of the Treasury.'.

(b) CONFORMING AMENDMENT—The table of contents for title VII of the Tariff Act of 1930 is amended by inserting the following new item after the item relating to section 753:

Appendix G

'SEC. 754. Continued dumping and subsidy offset.'.

(c) EFFECTIVE DATE—The amendments made by this section shall apply with respect to all antidumping and countervailing duty assessments made on or after October 1, 2000.

APPENDIX H — DEFICIT REDUCTION ACT OF 2005, § 7601, PUB. L. NO. 109-171, 120 STAT. 154 (2006)

Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006).

Subtitle F—Repeal of Continued Dumping and Subsidy Offset

SEC. 7601. REPEAL OF CONTINUED DUMPING AND SUBSIDY OFFSET.

(a) REPEAL.—Effective upon the date of enactment of this Act, section 754 of the Tariff Act of 1930 (19 U.S.C. 1675c), and the item relating to section 754 in the table of contents of title VII of that Act, are repealed.

(b) DISTRIBUTIONS ON CERTAIN ENTRIES.—All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section, be distributed under section 754 of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repealed by subsection (a).

No. 09-767

IN THE

Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN US CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TIMKEN US CORPORATION

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QUESTION PRESENTED

Whether Congress engaged in viewpoint discrimination in violation of the First Amendment when, in the now-repealed Continued Dumping and Subsidy Offset Act, it provided that a share of duties collected after an adjudication of injurious dumping would be distributed to parties that had petitioned for redress, or filed in support of the petition, but not to parties like SKF USA that, being affiliates of major dumpers, stated in their confidential responses to agency questionnaires that they opposed the petition for redress.

CORPORATE DISCLOSURE STATEMENT

Respondent "Timken US Corporation" (as identified in the caption) became Timken US LLC on March 27, 2008. It is a wholly owned subsidiary of The Timken Company, a publicly held company that has no parent and in which no other public company owns 10% or more of the stock.

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BRIEF IN OPPOSITION FOR RESPONDENT TIMKEN US CORPORATION

JURISDICTION

SKF USA's petition comes within 28 U.S.C. § 1254(1), but if review were granted, the Court would have to confront the question whether the Court of International Trade (CIT) had jurisdiction over this case under 28 U.S.C. §§ 1581(i) and 2636(i). *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (appellate court has "special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'"). As explained at pages 29-32, *infra*, that question is best answered in the negative, which is one reason to deny the petition.

STATEMENT

In 1988, Timken's predecessor filed a petition seeking redress under the antidumping laws because certain products (bearings) imported from nine countries, including products made by foreign affiliates of SKF USA in five countries, were being dumped into the United States. Two federal agencies, the International Trade Commission (ITC) and the Department of Commerce (Commerce), investigated and adjudicated the petition.

To implement statutory requirements that a petitioner seeking redress must be filing on behalf of a domestic industry and that an industry (not just the petitioner) be suffering or threatened with material injury, the ITC sent detailed questionnaires to all known domestic bearing companies. One question asked domestic producers whether they supported, opposed, or took no position on the petition. As

expected for affiliates of major foreign producers accused of dumping and their domestic importers, SKF USA replied in its confidential formal filing that it opposed the petition. Commerce eventually found that imports of bearings were being dumped by the major producers in each of the countries investigated, and the ITC found that the dumping harmed the domestic bearings industry. In 1989, Commerce issued antidumping duty orders on imports from the nine countries, including on imports from SKF affiliates in five of the countries.

Before 2000, the government retained antidumping duties. In 2000, Congress, recognizing that many dumpers continued dumping even after imposition of duties, changed the law to "neutralize" the harm from continued dumping. *See* Pet. App. 160a (congressional finding). It provided that where dumping continued in the face of an antidumping order, the duties collected by the government would be distributed to certain domestic producers that invest in the industry despite the continued dumping. One statutory precondition for receiving such distributions was that the domestic producer had either filed or supported the petition for the antidumping order in its confidential questionnaire response or other filing in the antidumping proceeding. SKF USA, having opposed the petition in its confidential questionnaire response, was therefore disqualified.

The Federal Circuit rejected SKF USA's claim, first made four years after the statute's enactment, that a party's disqualification from monetary relief based on its unsuccessful (confidential) position opposing the petition for redress was viewpoint discrimination in violation of the First Amendment. Congress repealed the challenged duty-distribution law in 2006.

A. The Relevant Antidumping Framework

This dispute traces to 1988, when Timken's predecessor filed a petition alleging that foreign producers in nine countries were dumping certain antifriction (*e.g.*, ball) bearings into the United States and thereby causing material injury to the domestic bearings industry. At that time, as now, two agencies divided the fact-intensive task of evaluating antidumping petitions. *See United States v. Eurodif, S.A.*, 129 S. Ct. 878, 883-84 (2009). Commerce determined whether "dumping" was occurring, with its "fundamental task" being "to compare the United States price of imported merchandise with the value of 'such or similar merchandise' in the home market." *NTN Bearing Corp. of America v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997); *see* Pet. App. 4a. The ITC, in turn, determined "whether such dumping ha[d] 'materially injured' or threatened material injury to a United States industry," *id.*, requiring an extensive factual inquiry. *See American Permac, Inc. v. United States*, 831 F.2d 269, 275 (Fed. Cir. 1987). If both determinations were affirmative, orders issued to impose antidumping duties on imports. Pet. App. 6a.[1]

The agencies, which "almost always rel[y] on [private] petitioners to initiate antidumping proceedings" (Pet. App. 4a), act as neutral investigators and adjudicators under the preexisting legal standards and have no position on the allegations in advance. They reject more than half the petitions for

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[1] Similar provisions involve "countervailing duties" (not at issue here), which target the domestic effects of imports supported by foreign subsidies (whereas "dumping" focuses on the disparity between home-country prices and import prices).

redress. From 1980 through 2007, only about 40% of petitions for relief resulted in antidumping or countervailing duty orders. *Antidumping and Countervailing Duty Handbook*, USITC Pub. 4056, at IV-7-8 (Dec. 2008), www.usitc.gov/trade_remedy/documents/handbook.pdf.

Congress required the agencies to conduct their proceedings, and either deny or grant relief, expeditiously. It established a staged process, with preliminary and then final determinations in both agencies subject to specified deadlines, and gave the agencies about one year to complete the entire process, including staff reports, hearings with interested parties, and agency determinations. *See* 19 C.F.R. pt. 351 Annexes III, VII (timelines). Reflecting the intensely factual nature of the determinations under existing law, including the determination of material injury to a domestic industry (19 U.S.C. § 1677(7)), the resulting antidumping orders are subject to review only for compliance with law and for "substantial evidence." 19 U.S.C. § 1516a(b)(1)(B)(i); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350 (Fed. Cir. 2006).

By 1988, Congress had established certain statutory standing requirements for parties filing petitions for redress of dumping, consistent with United States obligations under international trade agreements. The petitioner had to be an "interested party" filing "on behalf of an industry," where "industry" meant "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." *See Gilmore Steel Corp. v. United States*, 585 F. Supp. 670, 671 (CIT 1984) (quoting then-current 19 U.S.C.

§§ 1673a(b)(1), 1677(4)(A)); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 664-65 (Fed. Cir. 1992) (same). Those provisions imposed a "requirement of industry support" for the petition, which also was relevant to the material-injury issue. *Oregon Steel Mills Inc. v. United States Department of Commerce*, 862 F.2d 1541, 1545 (Fed. Cir. 1988) (relying on *Gilmore*); *see* Pet. App. 46a.[2]

B. The 1988-89 Antidumping Proceeding

The 1988 petition filed by Timken's predecessor sought imposition of antidumping duties for nine countries. Pet. App. 133a. "The petition was over 200 pages in length and included scores of pages of sales data collected from several countries, product descriptions and comparisons, detailed analysis of the U.S. antifriction bearing industry, and extensive proprietary financial data." *Id.* at 10a.

When the ITC sent its lengthy questionnaire to domestic producers to collect information about the industry (122 pages in SKF USA's case), it included a standard question asking each recipient whether it "supports the petition," "opposes the petition," or "does not wish to take a position on the petition." Ct. App. JA 73. SKF USA checked the second box: it "oppose[d] the petition." *Id.*; *see* Pet. App. 12a.

Contrary to the express premise of SKF USA's Question Presented—that it was denied any distribution because of its "publicly expressed opposition" (Pet. i; *see* Pet. 2, 3, 12, 13, 24, 27, 29, 30) —the determinative questionnaire response was *not* public.

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[2] In 1994, after the proceedings at issue here, Congress, pursuant to further treaty obligations, wrote specific numerical support requirements into the standing provisions. 19 U.S.C. § 1673a(c)(4); *see* Pet. App. 4a-5a n.1.

The agencies and SKF USA all treated the questionnaire response as confidential. Thus, "[b]oth the Commission and the Department of Commerce have interpreted [19 U.S.C. § 1677f, which requires confidentiality] to apply to information provided by questionnaire respondents, including whether or not they support a particular antidumping . . . petition." *Cathedral Candle Co. v. ITC*, 400 F.3d 1352, 1361 (Fed. Cir. 2005); *see* Pet. App. 15a n.9; Government Accountability Office, *Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, GAO-05-979, at 12 (Sept. 2005) (questionnaire responses are confidential). SKF USA confirmed the confidential treatment when, 16 years after filing its 1989 questionnaire response, it wrote to the ITC to "waive[] confidential treatment of its response to the ITC's question regarding support for the petition." Ct. App. JA 60-61 (March 2005 letter from SKF USA). And, as SKF USA effectively acknowledges (Pet. 9), the agencies expressly based SKF USA's ineligibility for distributions on the confidential questionnaire response. *See* Pet. App. 158a-159a (ITC letter refusing to add SKF USA to list of eligible recipients "because [it] had indicated that it opposed the petition *in its questionnaire response* in the original investigation") (emphasis added); Pet. App. 17a; GAO Report at 13.[3]

SKF USA is owned by a Swedish company, *see* Pet. ii, and other members of the SKF family were major accused dumpers in the matter. SKF USA's opposi-

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[3] SKF USA's confidential opposition, in 1989, precluded its later receipt of CDSOA distributions, regardless of any publication it chose to make, then or later. Confidential supporters, to claim distributions, eventually had to waive confidentiality to permit publication of the list of potentially eligible recipients.

tion to the petition was hardly surprising or unusual for an affiliate of a major foreign accused dumper, "who would not normally be expected to support a petition." S. Rep. No. 103-412, at 35 (1994).[4] The ITC eventually noted that, in this proceeding, "all of [the foreign-owned domestic producers] are in opposition to the petition." Ct. App. JA 459 (footnote omitted).

In the hearings before the ITC, the SKF family of companies (as a unit) took the lead in opposing the petition. *See, e.g.*, ITC Preliminary Hearing Tr. 167 (Apr. 21, 1988); Pet. App. 48a-49a; Pet. 23-24. Timken's predecessor, for its part, supported its petition (on behalf of the industry) through lengthy fact-intensive filings and through live testimony. *See* Pet. App. 13a-14a.

After extensive investigation, conduct of several hearings, and receipt of many filings, Commerce found dumping and the ITC found material injury with respect to specified types of bearings from a number of countries, including Japan (where SKF had no production facilities) and Sweden, Germany, France, Italy, and the United Kingdom (where SKF producers were prominent). *Id.* at 11a-14a. Country-by-country orders issued in May 1989, which, as later judicially modified, imposed antidumping duties at

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[4] Several statutory provisions reflect the incentives of domestic producers to oppose antidumping relief if they also import sufficient volumes of major dumpers' goods or are affiliated with major dumpers. *E.g.*, 19 U.S.C. §§ 1673a(c)(4)(B), 1677(4)(B). Timken's predecessor in 1988 had foreign affiliates in one or more of the countries covered by the petition; such affiliates would also be subject to coverage by the relevant orders. None of Timken's predecessor facilities were selected for investigation in the original investigation; before and since the orders, volumes imported from such affiliates have been small.

levels ranging from about 60% to 132% for ball bearings from SKF producers in five countries (with different levels for other bearings). *See* 54 Fed. Reg. 20901 (1989) (Germany: 132%), 20902 (France: 66%), 20910 (UK: 61%); 58 Fed. Reg. 12932 (1993) (Italy: 69%; Sweden: 105%); 54 Fed. Reg. 20904-06 (Japan: duty of 73% on *amicus* Koyo's parent). Thereafter, Commerce conducted periodic reviews of the imports covered by the orders and found that, despite the orders, the Japanese and SKF companies, among others, continued dumping year in and year out. *See, e.g.*, First Bearings Sunset Review, USITC Pub. 3309 (June 2000) (Vol. 2), at BB-I-8-22; Second Bearings Sunset Review, USITC Pub. 3876, at BB-I-8-28 (Aug. 2006); Ct. App. JA 47. Customs continued to collect antidumping duties on those imports.

C. The Continued Dumping and Subsidy Offset Act of 2000 (CDSOA, or Byrd Amendment)

In 2000, Congress recognized a chronic problem with the existing regime: high levels of dumping continued even for firms covered by antidumping orders. Many foreign producers like the SKF companies in Europe, even after being found to have engaged in injurious dumping, evidently found it profitable to continue dumping despite the duties.

Congress found: "The continued dumping . . . of imported products after the issuance of antidumping orders . . . can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels." CDSOA, Finding (3), Pub. L. No. 106-387, 114 Stat. 1549A-72 (2000).[5] Domestic invest-

[5] The findings appeared as a note to 19 U.S.C. § 1675c before the 2006 repeal of the CDSOA. We cite "§ 1675c" (now repealed)

ment in production would thereby be harmed (though foreign owners of domestic producers, and domestic importers of dumped goods, might benefit from dumping): "Where dumping . . . continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit," and domestic businesses "may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable." CDSOA, Finding (4).

To address this problem, Congress provided that, where dumping continued after issuance of an antidumping order, collected duties would be distributed to certain "affected domestic producers." § 1675c(a), (b)(1). Reflecting the statutory purpose, the distribution was to be "on a pro rata basis based on" the amounts of specifically enumerated kinds of expenditures and investments that continued dumping impaired. § 1675c(d)(3), (b)(4). The CDSOA applied to all antidumping duty assessments from October 1, 2000, forward. CDSOA § 1003(c). If dumping subject to an order ceased, no duties would be collected, and none would be distributed.

Congress defined the eligible "affected domestic producers" to be limited to two groups of parties in the underlying antidumping proceeding (as long as they remained in operation and had not ceased production of the covered product). The eligible entities, as relevant here, were any "petitioner" that had taken the initiative to seek redress—in what turned out to be a meritorious petition—and any "interested party in support of the petition." § 1675c(b)(1).

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for the substantive CDSOA provisions. The CDSOA is printed at Pet. App. 160a-169a.

Congress required that the law be implemented quickly: It gave the ITC 60 days to compile a list of petitioners and those other parties who "by letter or through questionnaire response" indicated support of the petition for each order in effect on January 1, 1999. § 1675c(d)(1). Reliance on the formal filings in the ITC's records made the quick implementation possible.[6] Initially and in subsequent years, Customs had to publish the list and ask each potential recipient to certify its interest in a distribution, its eligibility, and its qualifying expenditures. § 1675c(d)(2). Congress also required creation of order-specific Treasury accounts to hold deposits of duty assessments. § 1675c(e). And it demanded prompt annual distributions—within 60 days after the new fiscal year began. § 1675c(c).

In February 2006, after several foreign governments successfully challenged the CDSOA at the World Trade Organization (WTO), *see* Pet. 7, Congress repealed the statute, making the repeal effective for goods entering the country on or after October 1, 2007. Pet. App. 170a. Thus, the statute has been repealed for several years. The repealed CDSOA affects a diminishing pool of collected duties (*i.e.*, on certain entries made before October 1, 2007).

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[6] On December 31, 1998, about 300 antidumping orders (plus about 50 countervailing duty orders) were in effect. ITC, *The Year In Trade: Operation of the Trade Agreements Program During 1998*, USITC Pub. 3192 (May 1999), at 139-47 (listing orders), www.usitc.gov/publications/docs/pubs/year_in_trade/PUB3192.pdf.

D. SKF USA's 2005 Request and This Litigation

1. In the immediate aftermath of the CDSOA's enactment, the ITC compiled and Customs published the list of eligible distribution recipients for the 1989 orders—in December 2000 and August 2001, respectively. Pet. App. 15a-16a, 22a. SKF USA, disqualified by the statute's requirements, was not included. For each year, 2001 through 2004, the government published in the *Federal Register* its intention to make distributions under the 1989 (as well as other) orders subject to the CDSOA. *See id.* at 16a; 66 Fed. Reg. 40782 (2001); 67 Fed. Reg. 44722 (2002); 68 Fed. Reg. 41597 (2003); 69 Fed. Reg. 31162 (2004) (all cited by Timken in CIT). And it made such distributions. *See* Ct. App. JA 1027-28, cited in SKF USA Ct. App. Br. 8. SKF USA, receiving no money, sat by. It did not sue in 2001, 2002, 2003, or 2004 to challenge the statute.

In March 2005, SKF USA asked the ITC to add it to the list of eligible recipients, a request made without regard to any particular year's distributions. Ct. App. JA 59-61 (letter to ITC); *see* Pet. App. 16a-17a. The ITC denied that request (again, without regard to any particular year's distribution) on April 20, 2005, based on SKF USA's 1989 questionnaire response. *See id.* at 158a-159a (ITC denial letter); *id.* at 17a. When Customs thereafter published the list of eligible recipients for 2005, SKF USA asked Customs for distributions, but Customs denied the request, in July 2005, because SKF USA was not on the list. *Id.*

2. SKF USA filed a complaint in the CIT on October 3, 2005, claiming that its exclusion from distributions by the CDSOA support requirement violated

equal protection and First Amendment guarantees. *Id.* at 17a-18a. On SKF USA's motion for summary judgment, the CIT agreed with the equal protection challenge and remanded to allow calculation of distributions for SKF USA. *Id.* at 129a-155a. The CIT later affirmed the resulting remand determination, which was limited to distributions of duties collected on imports from Japan, despite SKF USA's argument for expansion to other countries. *Id.* at 109a-128a; *see id.* at 20a.

3. The Federal Circuit reversed. *Id.* at 1a-52a. After concluding that SKF USA's 2005 suit was timely (*id.* at 21a-26a), the court of appeals held that SKF USA's First Amendment challenge failed. *Id.* at 26a-51a. (It also rejected SKF USA's equal protection challenge, *id.* at 51a-52a, which SKF USA does not pursue here.)[7]

The court explained that the CDSOA's support requirement is tied to an interested party's active participation in the proceeding, through a full questionnaire response or other submission or action, not a "bare statement" of position. *Id.* at 37a n.26. The CDSOA provides for distribution of monetary relief based on "actions (litigation support) rather than the expression of particular views." *Id.* at 36a. Thus, it "does not prohibit particular speech" (*id.* at 28a; *id.* at 36a n.25) or, even, impose a monetary liability (*id.* at 38a-39a). And in identifying who may receive distributions, Congress was not seeking to suppress expression:

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[7] Judge Linn dissented (Pet. App. 53a-100a), and when the full court denied en banc review (*id.* at 101a-103a), three colleagues joined his dissent from en banc review (*id.* at 103a-108a).

> Neither the background of the statute, nor its articulated purpose, nor the sparse legislative history supports a conclusion that the purpose of the [CDSOA] was to suppress expression. Parties who are awarded antidumping distributions under the [CDSOA] may say whatever they want about the government's trade policies generally or about the particular antidumping investigation, provided they do so outside the context of the proceeding itself. Even within the proceeding, the [CDSOA] does not prohibit opposing views but merely promotes the efforts of those who support enforcement.

Id. at 32a. Rather, the court concluded, the statute combines two policies: one, to "compensate domestic producers injured by dumping" (*id.* at 29a); two, among those injured, to "reward those who assist in enforcement" by initiating or supporting petitions that turn out to be meritorious in identifying violations of trade law (*id.* at 33a).

The court of appeals explained that no decision of this Court "suggest[s] that an award of a portion of the government's recovery to a party assisting enforcement (while not rewarding those who oppose enforcement) would be unconstitutional." *Id.* at 39a. This Court's decisions neither question the validity of such a restriction of monetary redress in adjudication nor "establish a standard" for First Amendment analysis of this particular kind of government action. *Id.* Noting, among other things, that "[r]ewarding parties . . . here is similar to commercially contracting with them to assist in the . . . enforcement of government policy in litigation," the court of appeals concluded that some form of intermediate scrutiny—whether drawn from commercial-speech standards or

from *United States v. O'Brien*, 391 U.S. 367 (1968)—was "appropriate." Pet. App. 40a & n.28.

The court of appeals then explained that the CDSOA passed muster under any such intermediate scrutiny. *Id.* at 40a-51a. The government has a substantial speech-neutral interest in preventing injurious dumping (*id.* at 41a), and rewarding parties that assist in ferreting out instances of violations of the antidumping statute advances that interest and does so in a legitimate way—as recognized in *qui tam* statutes, attorney's fees provisions, and measures sharing government recoveries with whistleblowers and informers (*id.* at 41a-42a). The CDSOA, like such measures, provides for payments only if the charge of injurious dumping under preexisting legal standards turns out to be correct, not for claiming injurious dumping when the claim proves meritless. *Id.* at 44a, 50a-51a ("We emphasize again that Congress rewards only successful enforcement effort. Where the petition is unsuccessful, neither petition supporters nor opposers receive government payments . . . .").

Finally, providing distributions to those who support the petition through questionnaire responses sufficiently fits the governmental interest. The participation of interested parties involves substantial effort (sometimes costing more than any CDSOA relief) and is of central value to the agencies. *Id.* at 47a-48a. And while that expense may be incurred by opponents of relief as well, "Congress could permissibly conclude that it is not required to reward an opposing party." *Id.* at 48a. That rationale applies with particular force to an opponent, like SKF USA, that "is owned by a foreign company charged with dumping" and that "undertook a role that was nearly

indistinguishable from that played by a defendant in a *qui tam* or attorney's fees award case." *Id.* at 48a; *see id.* at 48a-49a.

ARGUMENT

The decision below is correct, and there is neither a lower court conflict nor any other persuasive reason for this Court to grant review of SKF USA's constitutional challenge to the now-repealed statute.

SKF USA's sole question is whether it is "viewpoint discrimination in violation of the First Amendment" to deny eligibility for monetary benefits based on "publicly expressed opposition" to an antidumping petition. Pet. i. But that question is not even presented in this case. The premise of denial based on "publicly expressed opposition," part of the Question Presented and repeatedly stressed throughout the petition (Pet. 2, 3, 12, 13, 24, 27, 29, 30), is inapplicable here, because SKF USA's ineligibility under the CDSOA was unalterably fixed by its *confidential* opposition in its questionnaire response in 1989. Page 6, *supra*. That is reason enough to deny review.

Even if its statement of opposition had been public instead of confidential, SKF USA still would have no valid First Amendment claim. There is neither precedent nor sound justification for finding a First Amendment violation (1) when a neutral adjudicator, applying existing legal standards, asks interested parties whether they are aligned with the petitioner seeking relief or (2) when, having determined that relief is warranted, the adjudicator awards relief only to those parties electing to be so aligned. Although SKF USA now wants to share in the proceeds from an antidumping order it opposed, the denial of its claim does not reflect a penalty on the exercise of its

free-speech rights—by which SKF USA means its answer to the party-alignment question—but rather the natural consequence of what that answer represented: a decision (by a party whose corporate family was benefitting from illegal dumping) not to ask for relief in the first place. To treat this kind of practical management of claims in proceedings for adjudication as unconstitutional "viewpoint discrimination" would stretch that important concept beyond recognizable bounds.

Even apart from the merits, review should be denied. The ruling below does not conflict with any other circuit's decision. Indeed, it addresses a narrow, apparently *sui generis* issue not presented in any other case. Moreover, the statute at issue has been repealed, and SKF USA itself identifies no other statute it says presents the same basis for unconstitutionality it urges here. Not surprisingly, no *amicus* except plaintiffs with their own CDSOA challenges has filed in support of review. Nor is there any unfairness in the bottom-line result of denying a share of existing antidumping collections to SKF USA, which opposed redress for anyone (rather than claimed it) and whose foreign affiliates were major adjudicated dumpers that have continued their dumping.

For those reasons—and because SKF USA's delay in challenging the CDSOA until 2005 would present a jurisdictional impediment to addressing the First Amendment issue here—the Court should not reach out to consider SKF USA's novel and meritless claim for strict First Amendment scrutiny in this commercial adjudicatory arena. The petition should be denied.

A. The Court of Appeals Correctly Rejected SKF USA's First Amendment Claim

1. The decisive problem with SKF USA's First Amendment argument is that it takes no account of context. Antidumping proceedings involve adjudications in which Commerce and the ITC, after investigation, apply existing legal standards to complex facts. Neither agency has a predetermined position on the question of industry support or any other issue in the proceedings. As SKF USA itself acknowledges: "The government's objective in those investigations is not to impose antidumping duties in all cases but to make a fair determination of whether duties are warranted under the particular circumstances presented." Pet. 23; *see* Furniture Brands *Amicus* Br. 3-4 ("the government's interest in enforcing antidumping laws lies not in achieving a *particular* outcome" but 'the *correct* outcome").

SKF USA does not claim that the First Amendment prohibits the ITC from asking domestic producers—who are interested parties in the proceeding—to indicate their support, or lack of it, for the imposition of antidumping duties. It argues only that, under the First Amendment, it cannot be denied a share of any duties generated by a petition that it opposed. But this would be an odd principle to find in the First Amendment. There is nothing sinister or suspicious about a rule that extends monetary relief only to claimants and to those parties aligned with them, and not to those indifferent, or opposed, to the awarding of any relief. And, while the decision to opt in or out implicates speech in the literal sense that the decision is conveyed by words, the denial of relief turns, not on the expression as such, but on the underlying choice in the formal proceeding not to

take the petitioner's side in seeking antidumping duties. Indeed, for SKF USA, it turns on having actually taken the accused dumpers' side in the proceeding.

Although the specifics appear to be *sui generis*, the CDSOA is hardly an unfamiliar or speech-threatening kind of measure. As the court of appeals explained, the very terms of the CDSOA rest distribution of monetary relief on two bases in combination—injury from dumping and an act of either filing or supporting a petition for relief from an alleged violation of preexisting, fact-intensive federal standards. *See* page 13, *supra*. For adjudicators to furnish awards to those who filed or joined a claim for redress of grievances, but not to those who refrain from calling for remedial action and those who oppose it (because of ties to major defendants), is common in our civil justice system and has never been thought to constitute viewpoint discrimination or to trigger strict scrutiny under the First Amendment. *See, e.g.*, Sup. Ct. R. 12.6 ("Parties who file no document will not qualify for any relief from this Court."); *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981) (party that failed to appeal is subject to *res judicata* despite appellate success of other party).

Thus, if the antidumping laws were enforced through tort actions, only those parties that agreed to be plaintiffs would be able to recover damages. In a class action, potential plaintiffs could be required to make express their decision to opt in or out. *See* Fed. R. Civ. P. 23(c)(2). Though that decision would be expressed through speech, the award of remedies only to plaintiffs and not to others would be neither impermissible viewpoint discrimination nor other-

wise unusual or illegitimate. The same conclusion applies to the CDSOA.

Likewise familiar and legitimate are other kinds of provisions for limited monetary distributions in successful litigation that uncovers a violation of preexisting legal standards, as with *qui tam*, attorneys' fees, and related measures. *See* Pet. App. 41a-42a.[8] The relevant principles apply all the more strongly here, where those who petitioned for redress or actively supported the petition are most likely to be seriously injured overall by (what turns out to be) unlawful dumping, and those who opposed redress are most likely to benefit overall, either because they imported the dumped goods or because they are corporate affiliates of major dumpers.[9]

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[8] The court of appeals relied on the terms of the CDSOA to describe what the statute actually does, then concluded that its actual functioning had analogues in familiar practices long accepted as legitimate for easily stated reasons. This analysis neither improperly relies on purposes unapparent on the statute's face (*contra* Pet. 17-20) nor improperly posits governmental interests to support constitutional validity (*contra* Pet. 21-24). It is, rather, consistent with the Court's methodology: "The purpose, or justification, of a regulation will often be evident on its face." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (rejecting strict scrutiny). SKF USA cites no contrary authority. Its only arguably pertinent decision, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), nowhere states that statutory validity can rest only on interests advanced by government counsel (indeed, statutes may be upheld despite the government's urging of invalidity); and what the Court rejected was an interest that was not apparent on the face of the statute and that the statute did not adequately fit.

[9] *Amici* Ashley Furniture *et al.*, to the extent they are not refighting their own underlying dumping determinations, explain chiefly how certain domestic firms adjusted to dumping (of furniture from certain Asian countries) by joining with

The CDSOA bears no resemblance to statutes invalidated because aimed at suppressing "dangerous ideas" or designed to "drive certain ideas or viewpoints from the marketplace." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (discussing precedents). There is no threat to public discourse on policy issues in this measure, which "merely rewards successful applicants" for redress before a neutral forum. Pet. App. 40a n.29. In the litigation-participation context, the Court has taken pains to avoid questioning even the affirmative imposition of a monetary assessment based on the litigation position a plaintiff took, notwithstanding First Amendment protections for filing suits: "[N]othing in our holding today should be read to question . . . the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002). The CDSOA involves the distinctively lesser measure of denying a monetary distribution, doing so based on a formal (nonpublic) filing responsive to an independently legitimate inquiry (to ascertain the representative status of the petitioner and the extent of actual or threatened injury). As applied here, the

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dumpers to share the benefits of dumping. That may be a rational economic response, but Congress hardly needs to support it by awarding monetary relief to such firms, thereby undermining the policy of stopping injurious dumping.

Contrary to the suggestion of *amici* Giorgio Foods *et al.* (at 6), the CIT found in *PS Chez Sidney, LLC v. ITC*, 442 F. Supp. 2d 1329, 1357 (CIT 2006), that it was "not irrational to believe that there may be some correlation, indeed, quite possibly a high one, between expression of support for a dumping petition and harm to the [questionnaire] responder," noting only that there was no "necessary" connection.

statute's effect is to deny relief to a party allied with a major perpetrator of illegal dumping.

The CDSOA thus reflects familiar, accepted principles of our legal system. It does not involve prohibitions or penalties or other affirmative liabilities. Nor does it target speech directed to the public. Like a variety of accepted aspects of our civil justice system that provide for awards to those who seek relief but not to those who oppose relief, the CDSOA raises none of the special threats to First Amendment principles, such as a skewing or significant chilling of public discourse (or personal expression), for which strict scrutiny is reserved. There is no justification for newly extending the highest level of First Amendment scrutiny into this arena, which, among other things, would invite unprecedented and unsettling challenges to fixtures of our legal system.

2. SKF USA does not dispute that, if some form of intermediate (or lower) scrutiny applies to this measure, the First Amendment is satisfied. Rather, it argues for "strict scrutiny" on the ground that the CDSOA is a form of unconstitutional "viewpoint discrimination." Pet. i, 14-15. Indeed, its question presented rests squarely on the premise that it was denied monetary distributions based on its "publicly expressed opposition" to the antidumping petition. Pet. i. But because this "public opposition" premise—stressed by SKF USA and the *amici* alike—is inapplicable here, SKF USA's challenge must fail. And it fails regardless, because no precedent has ever treated as unconstitutional viewpoint discrimination a measure that relies on a formal filing before a neutral adjudicator as a basis for determining qualification for relief in the proceeding—specifically, as applied to SKF USA, for denying monetary

relief when the submission supported the losing defendants.

As is readily apparent from familiar features of litigation, not all government distinctions based on views, regardless of the nature or context of the measure, are condemned or subjected to strict scrutiny. *See Davenport v. Washington Ed. Ass'n*, 551 U.S. 177, 188-89 (2007); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-50 (1983); *Connick v. Myers*, 461 U.S. 138 (1983). The Court has permitted selective conferral of benefits on particular speakers, even based on viewpoint, where the selection is not "aimed at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (internal quotation marks omitted). *See also United States v. American Library Ass'n*, 539 U.S. 194, 209-10 n.4, 212-13 (2003) (plurality) (distinguishing "decision not to subsidize" speech, not subject to strict scrutiny, from "direct regulation" or "penalties").

SKF USA cites no authority that even involves, let alone applies a strict-scrutiny viewpoint-discrimination rule to, a measure like the CDSOA addressing parties' claims for relief in adjudications under preexisting legal standards (especially as applied to SKF USA). *See* Pet. 14-16. Snippets taken from rulings in different contexts do not establish a viewpoint-discrimination rule for this context. *Cf. R.A.V. v. St. Paul*, 505 U.S. 377, 386-87 n.5 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.").

For example, the two decisions SKF USA features most prominently are plainly inapposite. *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), involved a confiscation of criminals' earnings from writing about their crimes. And *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), involved a (limited) "public forum," an avenue for speakers to address their speech to listeners of their choosing among the public (or a segment of it), whereas antidumping proceedings are not public fora, and questionnaire responses (which are confidential) are formal filings addressed simply to a neutral adjudicator. SKF USA also mentions *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), but that case involved a ban on certain newsracks. In multiple ways, these authorities all address laws that involve matters quite different from the allocation of monetary relief in a neutral adjudicatory setting at issue here. Even the one relied-on decision that involves a litigation context, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001)—which SKF USA cites in only a limited way (Pet. 34)—is critically different: it involved a ban on funding certain private lawsuits that *challenged government laws*, a ban that the Court determined was "aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 549. Nothing of the sort is present in this case.[10]

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[10] Other cases cited by SKF USA are no closer to the present context. Pet. 15 n.10 cites certain public or nonpublic forum cases. In addition, *Speiser v. Randall*, 357 U.S. 513 (1958), found only a due process violation in certain procedures for denying a tax exemption based on speech that the Court assumed California could punish. *Turner*, *supra*, rejected strict scrutiny, and a claim of content discrimination, in a challenge to a requirement that cable operators carry broadcast channels.

Finally, SKF USA suggests that the court of appeals decision is inconsistent with the limited scope of this Court's "commercial speech doctrine." Pet. 24-26. But that suggestion rests on the incorrect premise that the court of appeals deemed the questionnaire response to *be* "commercial speech." As SKF USA itself recognizes, that is not what the court of appeals did. Rather, after explaining that the novelty of SKF USA's claim meant that no precedent of this Court announced a directly applicable standard, the court "analogized" the CDSOA to a commercial contract for enforcement assistance (Pet. 24) and invoked the general three-part framework of the commercial-speech form of intermediate scrutiny as an "appropriate" structure for analysis, while noting that *O'Brien* intermediate scrutiny would produce the same result. Pet. App. 40a; *see id.* at 39a ("rewarding those who support government enforcement is at

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Perry v. Sindermann, 408 U.S. 593 (1972), involved non-renewal of employment based on public criticism in newspapers and other media. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), involved a ban on cable operators' carriage of certain sexual speech without signal scrambling during certain hours. *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a free-exercise-of-religion issue. *Burson v. Freeman*, 504 U.S. 191 (1992), involved, and upheld, a ban on campaigning near a polling place. *FCC v. League of Women Voters*, 468 U.S. 364 (1984), involved the special First Amendment doctrines involving broadcasting and applied that law to a ban on editorializing by federal-funds recipients.

The *Noerr-Pennington* cases featured by *amicus* Koyo (at 15-19), which SKF USA does not cite, involve imposition of affirmative liabilities based on lobbying political organs or filing lawsuits, do not invoke a viewpoint-discrimination rule, and as *BE & K* makes clear, do not question the imposition of attorney's fees, let alone a measure like the CDSOA involving allocation of relief.

least constitutional if those provisions satisfy the standards governing commercial speech").

Thus, not having declared that this was a case of commercial speech, the court of appeals said nothing to conflict with the definitions of that doctrine. More generally, with the decision not resting on that doctrine, the case presents no opportunity to address any debates about precisely what is within its bounds. Pet. 31-33. If that issue warrants review, the Court should await a case in which the lower court actually holds the matter to be covered by the doctrine, rather than merely drawing on its general framework to address a novel challenge.

B. There Is No Intercircuit Conflict Or Other Reason to Review the Decision Rejecting SKF USA's Challenge to This Repealed Statute

1. The decision below creates no intercircuit conflict. SKF USA's contrary assertion (Pet. 26-31) again rests on its disregard of critical differences between the CDSOA and the measures at issue in the decisions it cites.

SKF USA's main authority, *Lac Vieux Desert Band v. Mich. Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999), involved something quite different from the present case. It involved a city's grant of a contract-bidding preference based on the favored bidder's having engaged in political advocacy to city and state electorates by sponsoring and promoting voter referenda to alter city and state law (to permit gambling). *See* Pet. App. 44a n.32. The rewarding of public advocacy for legislative change is far afield from the CDSOA's distinction between proponents and non-supporters (including opponents) of petitions

for redress addressed to a neutral adjudicator applying preexisting standards.

Hoover v. Morales, 164 F.3d 221 (5th Cir. 1998), is likewise inapposite. It involved (a) a ban (b) on a State employee (c) testifying as a witness (d) against the pre-determined State position—a plain suppression of a viewpoint (to be evaluated under the distinctive body of public-employee First Amendment doctrine). Similarly, both *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), and *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), involved prohibitions (on signs or solicitation), not monetary relief in adjudication.

2. Review is also unwarranted because the statute at issue has been repealed. Although that fact does not moot the case, *see* Pet. 36 n.20, it does strongly counsel against the exercise of certiorari discretion. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77 (1955); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 499 (1971) (Harlan, J., concurring). SKF USA urges review because Congress might some day re-adopt the CDSOA. Pet. 36-37. But such anticipatory instruction to Congress is not in keeping with the respect this Court shows Congress. Here in particular, the WTO ruling on the CDSOA makes any such re-enactment especially speculative.

Meanwhile, the legal issue here has no significance outside the CDSOA context. Not a single *amicus* has filed in support of certiorari except those who have pending suits to challenge the CDSOA. That fact confirms that the ruling below implicates no First Amendment interest of any consequence beyond this narrow measure. SKF USA itself does not identify

and accuse of unconstitutionality any other legislative or regulatory measure with the CDSOA's features.

SKF USA thus cannot plausibly claim that review is needed to avoid a chilling of speech. Of course, its own opposition to relief, in 1989, could hardly have been chilled by the 2000 enactment, and the statute's repeal precludes any future chilling. Moreover, with no other comparable measure identified by SKF USA, chilling outside the CDSOA context is pure speculation. More generally, in any setting like this one, the risk is surely minimal that a party will change its party-alignment position, rather than provide neutral adjudicators with its truthful response to a question, let alone that any such choices will distort the adjudicatory process. In any event, any such risk is not remotely substantial enough to overturn a familiar, legitimate measure awarding monetary relief only to claimants and not opponents in an adjudication.

3. The impact of the CDSOA itself does not justify review. Precise figures are unavailable, but SKF USA's estimate of $1 billion appears greatly excessive. Pet. 2, 8 & n.6, 13, 35.[11] Moreover, the continued effect of the repealed CDSOA is narrow.

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[11] Although referring to "special accounts," SKF USA cites figures for "clearing accounts" (Pet. 8 n.6), which are different. Moreover, SKF USA's figure encompasses all orders (not just those at issue in the cases containing CDSOA challenges). SKF USA's figures also come from October 2008—whereas the October 2009 figures for all orders' clearing accounts are about *half* of SKF USA's figure. And, of course, the amounts being held include vastly more than any amounts that might shift to challengers; they include, as well, amounts for antidumping relief to petitioners and supporters—which challengers would not receive regardless.

The CDSOA challengers are highly concentrated: 34 of the 40-plus challenges (and three of four *amicus* briefs) involve either domestic subsidiaries of foreign bearing companies or domestic companies importing furniture subject to antidumping duties.

In any event, there is no injustice in giving the CDSOA its remaining effect, especially as to producers like SKF USA. The amounts at stake are not assessments to be levied on SKF USA and other challengers, but only amounts they would not receive.[12] And with apparently one exception, all of the firms that believe they have enough at stake to file or join an *amicus* brief have, like SKF USA, strong economic ties to major dumpers (essentially the companies found to have engaged in injurious dumping in the original proceeding and to have continued dumping thereafter), either through corporate affiliation or through importing of dumped goods.[13] (That is also true of a substantial majority of the plaintiffs in the cases stayed in the CIT or Federal Circuit, while an additional three involve plaintiffs

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[12] Indeed, SKF USA and *amici* might receive nothing even if the CDSOA were invalidated: the "support" provision might be severed to limit eligibility to petitioners. *Cf.* Pet. App. 45a n.35.

[13] The one possible exception is PS Chez Sidney, which, in the antidumping proceeding concerning crawfish tail meat from China, checked the "support" box in the preliminary questionnaire and the "no position" box in the final questionnaire. *See* Giorgio Foods *Amicus* Br. 4-6. The ITC chose to treat the last statement (the questionnaire response in the final injury proceeding) as controlling. Chez Sidney's joint amicus, Giorgio Foods, is a self-declared importer of mushrooms from India and specifically objected to the petition with respect to India. *See* Giorgio Foods Amended Complaint in CIT, Case No. 03-00286, ¶ 32 (Oct. 12, 2006) ("Giorgio Foods opposed the petition with respect to India, and imported subject merchandise from India").

that were ineligible under CDSOA on the separate ground that they did not produce the product covered by the order at the time of the original antidumping investigation.)

Although they now all want to share in the proceeds, there is nothing unjust about denying affirmative monetary redress to persons whose corporate affiliates, or who themselves, were sizable beneficiaries, or even perpetrators, of the injurious dumping being remedied. Indeed, giving money back to such firms, after the dumping continued despite the imposition of antidumping-duty orders, would frustrate the clear and legitimate congressional policy to redress dumping.

4. Finally, there is a jurisdictional impediment to reaching the First Amendment issue presented by SKF USA. Timken (with the ITC) contended in the court of appeals that the CIT lacked jurisdiction over this case, because the applicable statute of limitations took SKF USA's complaint outside the CIT's jurisdiction. The Federal Circuit rejected that contention. Pet. App. 24a-26a. But the court should have concluded otherwise. That is a further reason to deny review of SKF USA's petition.

The governing limitations statute, 28 U.S.C. § 2636(i)—enacted as part of the same 1980 statute that added 28 U.S.C. § 1581(i), the basis of the CIT's jurisdiction here—declares that, with exceptions not applicable here, a "civil action of which the [CIT] has jurisdiction under section 1581 . . . is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." As the Federal Circuit assumed without deciding (Pet. App. 23a), Section 2636(i) is jurisdictional. No material distinction exists between that

provision and 28 U.S.C. § 2501, which the Court has held to be jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).[14]

SKF USA's challenge to the CDSOA, as applied to deny it distributions in 2005, should be held barred by the two-year statute of limitations. Although SKF USA did not file suit until 2005, its challenge accrued no later than the first concrete injury it incurred, in 2001, as a result of the 2000 action (the CDSOA) that conclusively barred it from receiving any distributions under the 1989 orders. No decision made by the government afterwards altered, or could have altered, the bar on SKF USA's receiving any distribution, whether in 2005 or earlier, or in any way changed SKF USA's constitutional argument. The agencies, lacking authority to lift the congressional bar, engaged only in non-discretionary application of the bar to SKF USA—which, though immediately affected by the statutory ineligibility for distributions, did not sue until 2005.

SKF USA undeniably could have challenged the CDSOA in 2001. And a new clock did not start in 2005 for SKF USA to challenge its ineligibility for

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[14] The jurisdictional character of Section 2636(i) made immaterial the timeliness of Timken's raising of the issue in the CIT. In January 2006, Timken had filed its answer to SKF USA's October 2005 complaint, and in March 2006, the CIT had established a schedule under which SKF USA, in May 2006, moved for summary judgment. In early July 2006, a few days before its response to SKF USA's summary judgment was due, Timken raised the issue of SKF USA's compliance with Section 2636(i) by moving to amend its answer to the complaint to add an affirmative statute-of-limitations defense (and laches). The CIT denied the motion, stating that it was "untimely" and, on the merits, that SKF USA's complaint came within Section 2636(i)'s limitations period. Ct. App. JA 87-88.

2005 distributions (which became available, of course, only in 2005) on grounds that depended only on the statute, not on any particular application. To conclude otherwise, as the Federal Circuit did (Pet. App. 25a), is incompatible with what this Court recognized as a fundamental "statute of limitations" principle in, *e.g.*, *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Such cases held that where the defendant committed an alleged wrong that caused immediate injury to the plaintiff, that injury started the limitations period, and once the period ran, the plaintiff could not challenge that wrong when again injured *simply* by the automatic, non-discretionary propagation of that wrong into a later concrete application, causing additional injury but with no new facts altering the legal ground for the claim of wrong. In *Ledbetter*, where the challenged pay disparity within the limitations period did not exist, of course, until any employees were paid in that period, the Court applied that principle even though the employer could have eliminated the pay disparity within the limitations period. *Id.* at 623-43.[15]

The principle applies all the more strongly in this case, where the limitations provision is jurisdictional and an Act of Congress is challenged. The 2000 enactment of the CDSOA was the decision that

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[15] Congress has amended Title VII to change the result in *Ledbetter* in specified employment settings. *See* Pub. L. No. 111-2, 123 Stat. 5 (2009). But, except for those settings, the amendment does not alter the general underlying limitations principle. *See Ledbetter*, 550 U.S. at 627 n.2 (principle of earlier precedent remains valid, despite context-specific congressional modification).

conclusively foreordained the 2005 denial of distributions, the 2000 Act is what is alleged to be unconstitutional on grounds that do not vary at all with the year-by-year applications, the agencies had no discretion to alter the CDSOA's exclusion of SKF USA after 2000, and SKF USA was injured by the Act in 2001 in the very way it claimed as to 2005. SKF USA therefore had to challenge the CDSOA within two years. The agencies' automatic, non-discretionary application of the 2000 Act to deny 2005 distributions should not restart the clock for SKF USA's challenge.[16]

In short, SKF USA's suit came too late under a jurisdictional statute of limitations. That jurisdictional defect makes this case a poor vehicle to grant certiorari for review of the First Amendment issue even if the issue otherwise warranted review, which it does not.

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[16] A recently argued case, *Lewis v. City of Chicago*, No. 08-974, argued Feb. 22, 2010, involves a distinct limitations issue, concerning timeliness of a disparate-impact challenge to use of an employment test. There, Title VII's nonjurisdictional agency-charge clock runs from when "the alleged unlawful employment practice occurred" (42 U.S.C. § 2000e-5(e)(1)), and the substantive claim appears to be that each decision to "use" test results, based on disparate-impact standards, unlawfully "limit[ed]" or "adversely affect[ed]" employees based on race (42 U.S.C. §§ 2000e-2(a)(2), 2000e-2(k)(1)(A)(i)). Here, in contrast, the jurisdictional limitations clock starts when the cause of action "first accrues"; SKF USA claims viewpoint discrimination; and the only relevant challenged government *choice* was the enactment of the CDSOA, after which the agencies had to deny SKF USA relief in every application of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(7)

No. 09-767

In the Supreme Court of the United States

SKF USA INC., PETITIONER

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The antidumping-duty law, 19 U.S.C. 1673, authorizes the Department of Commerce to impose duties on foreign merchandise sold in the United States at less than its fair value if such sales cause material injury, or threaten to cause material injury, to domestic industry. The law permits an interested party, including a member of domestic industry, to initiate an antidumping proceeding by filing a petition, provided that the petition has a specified level of support among domestic producers or workers. 19 U.S.C. 1673a(b), (c)(1)(A) and (c)(4).

The now-repealed Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), Pub. L. No. 106-387, Tit. X, 114 Stat. 1549A-72 (19 U.S.C. 1675c (2000)), repealed by Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 154, provided that antidumping duties on merchandise that entered the United States before October 1, 2007, would be distributed annually to "affected domestic producers." Potential recipients of such distributions include any "petitioner or interested party in support of the petition with respect to which an antidumping duty order * * * has been entered." In 2005, petitioner was found to be ineligible for distributions under a particular antidumping-duty order because it had not supported the petition for that order. The question presented is as follows:

Whether the CDSOA's support requirement violated the First Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 556 F.3d 1337. The initial opinion of the Court of International Trade (Pet. App. 129a-155a) is reported at 451 F. Supp. 2d 1355. That court's later opinion upholding the determinations of the International Trade Commission and the Bureau of Customs and Border Protection on remand (Pet. App. 109a-128a) is reported at 502 F. Supp. 2d 1325.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2009. A petition for rehearing was denied on September 29, 2009 (Pet. App. 101a-108a). The peti-

tion for a writ of certiorari was filed on December 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In international trade law, the practice of exporting goods to another country to be sold at less than their fair value—*i.e.*, the price for which they are sold in the producer's home market, or their cost of production—is known as "dumping." See 19 U.S.C. 1677(34). Section 1673 of Title 19 authorizes the Department of Commerce to impose antidumping duties to "address harm to domestic manufacturing from foreign goods sold at an unfair price." *United States* v. *Eurodif S.A.*, 129 S. Ct. 878, 883 (2009).[1]

The Department of Commerce may initiate an antidumping proceeding either on its own initiative or in response to a petition filed by an interested party, including a member of domestic industry. 19 U.S.C. 1673a, 1677(9)(C); see 19 C.F.R. 351.202(a) (noting that the Department of Commerce "normally initiates antidumping * * * duty investigations based on petitions filed by a domestic interested party"). A petition must be "filed by or on behalf of the industry," 19 U.S.C. 1673a(c)(1)(A)(ii), meaning that it must receive a specified level of support from domestic producers or workers, 19 U.S.C. 1673a(c)(4).

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[1] Separate statutory provisions authorize the Department of Commerce to impose countervailing duties on merchandise whose "manufacture, production, or export" is subsidized by a foreign governmental entity, and materially injures, or threatens to materially injure, domestic industry. 19 U.S.C. 1671. Because this case involves only antidumping-duty orders, our discussion of the legal framework is limited to antidumping procedures.

Once an antidumping proceeding has commenced, the International Trade Commission (ITC) must determine whether there is a material injury or threat of material injury to a domestic industry by reason of allegedly dumped imports. 19 U.S.C. 1673(2). To make that determination, the ITC issues questionnaires to domestic producers in which it solicits detailed factual information relating to, *inter alia*, production capacity, production, shipments, inventories, prices, and employment records, for periods spanning several years. See Pet. App. 47a. The ITC also considers the degree of support for the petition from members of the domestic industry. See, *e.g.*, *Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 44 F.3d 978, 984 (Fed. Cir. 1994). The ITC's domestic-producer questionnaires accordingly have long included a question asking whether the producer supports, opposes, or is neutral as to the relief sought by the petitioner. Pet. App. 5a.

If the ITC issues a negative determination with respect to material injury, the investigation is terminated. If the ITC issues an affirmative determination, and if the Department of Commerce has determined that the foreign merchandise at issue in the investigation "is being, or is likely to be, sold in the United States at less than its fair value," 19 U.S.C. 1673(1), it issues an antidumping-duty order directing United States Customs and Border Protection (Customs) to assess duties on the merchandise. 19 U.S.C. 1673d(c)(2), 1673e(a)(1).

2. Antidumping duties, like other customs duties, have typically been deposited into the United States Treasury for general purposes. In 2000, however, Congress enacted the Continued Dumping and Subsidy Offset Act (CDSOA or Byrd Amendment), Pub. L. No. 106-387, Tit. X, 114 Stat. 1549A-72 (19 U.S.C. 1675c

(2000)), repealed by Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 154. Enacted to further the remedial purposes of the fair trade laws, CDSOA § 1002, 114 Stat. 1549A-72, the CDSOA directed Customs to distribute monies collected pursuant to antidumping-duty orders to "affected domestic producers" in order to allow such producers to recoup certain qualifying expenditures. 19 U.S.C. 1675c(a) (2000); see 19 U.S.C. 1675c(b)(4) (2000) (defining "qualifying expenditures" to include various costs of production). The CDSOA defined the term "affected domestic producer" to mean "any manufacturer, producer, farmer, rancher, or worker representative" that "was a petitioner or interested party in support of the petition with respect to which an antidumping duty order * * * has been entered," and that "remains in operation." 19 U.S.C. 1675c(b)(1) (2000); see 19 U.S.C. 1677(9)(C) ("interested party" includes, *inter alia*, any "manufacturer, producer, or wholesaler in the United States of a domestic like product").

In 2006, after the Appellate Body of the World Trade Organization (WTO) held that the CDSOA violated the United States' obligations in several international agreements,[2] Congress repealed the CDSOA. Deficit Reduction Act of 2005 § 7601(a), 120 Stat. 154. Congress provided, however, that "[a]ll duties on entries of goods made and filed before October 1, 2007 * * * shall be distributed" pursuant to the CDSOA. *Id.* § 7601(b), 120 Stat. 154.

3. In 1988, the Torrington Company, a domestic producer of antifriction bearings and a predecessor of

[2] See Appellate Body Report, *United States—Continuing Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R (Jan. 16, 2003), available at 2003 WL 134123.

respondent Timken US Corporation (Timken), filed a petition alleging that imports of antifriction bearings from several countries were being dumped in the United States. Pet. App. 9a; see *id.* at 18a n.11. The Department of Commerce commenced antidumping proceedings. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France*, 53 Fed. Reg. 15,074 (Dep't of Commerce 1988).

The ITC issued questionnaires to domestic producers, asking for detailed factual data on their production and financial operations. The questionnaires also asked whether the producers supported the Torrington Company's petition. Pet. App. 12a. After further investigation, the ITC determined that domestic industry was materially injured by reason of certain imports of antifriction bearings. *Id.* at 13a-14a. The Department of Commerce subsequently found that the antifriction bearings were being dumped in the United States, and it accordingly issued antidumping-duty orders against antifriction bearings imported from several countries, including Japan. *Id.* at 14a.

In 2000, after the CDSOA became effective, the ITC produced an initial list of supporters of the petition that had resulted in the antidumping-duty orders relating to ball bearings from Japan. Pet. App. 15a; see 19 U.S.C. 1675c(d)(1) (2000). Each year thereafter, Customs published a notice of intent to distribute funds to that group of eligible domestic producers. Pet. App. 16a; see 19 U.S.C. 1675c(d)(2) (2000).

4. Petitioner is a domestic subsidiary of a major foreign bearings producer that was a respondent in the antidumping proceedings. In response to the ITC's questionnaire, petitioner checked a box indicating that it opposed the relief sought by the Torrington Company.

Pet. App. 12a. Because petitioner had not supported the Torrington Company's petition, petitioner was not included in the ITC's list of entities eligible to receive CDSOA distributions, and for four years petitioner made no effort to claim a share of the annual CDSOA distributions. *Id.* at 16a.

In 2005, petitioner requested for the first time that the ITC add it to the list of entities eligible to receive CDSOA distributions under the antidumping-duty order covering antifriction bearings from Japan. Pet. App. 16a. The ITC denied the request on the ground that petitioner had not supported the petition and therefore was not an "affected domestic producer" within the meaning of the CDSOA. *Id.* at 17a. Petitioner later requested CDSOA distributions from Customs. That request was also denied. *Ibid.*

5. Petitioner filed suit in the United States Court of International Trade (CIT), challenging the determination of the ITC and Customs that petitioner was not an "affected domestic producer" and was therefore ineligible for distributions under the relevant antidumping-duty order. Pet. App. 130a. Petitioner contended that the distribution scheme established by the CDSOA, under which a particular entity's eligibility for distributions turns on whether that entity supported or opposed the relevant antidumping-duty petition, violated the First and Fifth Amendments. See *ibid.* The CIT granted petitioner's motion for judgment upon the agency record. *Id.* at 129a-155a.

The CIT held that the CDSOA's support requirement violated the equal protection component of the Fifth Amendment because that requirement lacked a rational basis. Pet. App. 141a-146a. The court stated that "[t]he plain language of the CDSOA fails to rationally indicate

why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry." *Id.* at 143a. The CIT further concluded that the support requirement of the statute must be severed, so that all domestic producers that had participated in the relevant antidumping investigation would be eligible to receive CDSOA funds, regardless of whether they had supported the petition. *Id.* at 151a-153a. The CIT remanded the case to allow Customs and the ITC to determine whether petitioner was eligible to receive a CDSOA distribution for fiscal year 2005 under that standard. *Id.* at 153a-154a. On remand, Customs and the ITC concluded that petitioner would qualify for a distribution under that standard, and the CIT affirmed. *Id.* at 109a-128a.

6. The federal respondents and Timken appealed the CIT's judgment to the Federal Circuit. On appeal, petitioner urged affirmance primarily on First Amendment rather than equal protection grounds. The court of appeals reversed. Pet. App. 1a-52a.

a. The court of appeals first held that petitioner's as-applied challenge was not barred by the applicable two-year statute of limitations, 28 U.S.C. 2636(i), which the court assumed was jurisdictional under *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008). The court reasoned that, even though petitioner had waited approximately five years after the CDSOA was enacted and the ITC promulgated its list of entities eligible to receive CDSOA distributions, and some four years after Customs had published that list, its suit was timely because petitioner "could not file suit to recover fiscal year 2005 Byrd Amendment distributions until it

was known whether Byrd Amendment distributions would be available"—*i.e.*, when Customs published its notice of intent to distribute duties for fiscal year 2005. Pet. App. 24a-25a.

On the merits of petitioner's First Amendment challenge, the court of appeals rejected petitioner's argument that the CDSOA "is impermissibly designed to penalize those who oppose antidumping petitions." Pet. App. 31a. The court disagreed with the government's position that "the statute's only purpose was to compensate those who are injured by dumping," using "petition support as a surrogate for injury." *Id.* at 30a. After reviewing the statute's text and purposes, the court concluded that the CDSOA was also designed "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings," *id.* at 33a; see *id.* at 36a ("The language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views.").

The court of appeals held that the statute's "subsidiary purpose" of rewarding injured parties that assisted in enforcement efforts did not render the statute unconstitutional. Pet. App. 31a-52a. Noting that this Court's cases "do not establish a standard for determining when such rewards * * * would be forbidden by the First Amendment," the court of appeals relied by analogy on the standard of scrutiny set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), for reviewing commercial-speech regulations. Pet. App. 39a-40a; see *id.* at 40a n.28 (noting that the result would be the same under "the test for speech combined with conduct in *United States* v. *O'Brien*, 391

U.S. 367, 377 (1968)"). The court concluded that the distribution scheme established by the CDSOA satisfied that standard of review. *Id.* at 40a. The court explained that "preventing dumping is a substantial government interest" and that the CDSOA "directly advances" that interest "by rewarding parties who assist in [trade-law] enforcement." *Id.* at 41a; see *id.* at 44a ("[T]he Byrd Amendment—like qui tam proceedings, monetary awards of a portion of the government's recovery, and awards of attorney's fees— shifts money to parties who successfully enforce government policy."). The court further concluded that the CDSOA is not unduly broad, and that Congress could reasonably choose to reward the supporters of antidumping-duty petitions without rewarding opponents as well. *Id.* at 44a-51a. Finally, finding that "the Byrd Amendment is rationally related to the government's legitimate purpose of rewarding parties who promote the government's policy against dumping," the court of appeals held that the CIT had erred in concluding that the CDSOA violated the Fifth Amendment's equal protection guarantee. *Id.* at 51a-52a.

b. Judge Linn dissented. Pet. App. 53a-100a. In his view, the CDSOA's support requirement was subject to strict scrutiny because it "denies a benefit on the basis of expression of a viewpoint on a political matter in a public forum." *Id.* at 89a. Applying strict scrutiny, Judge Linn would have held the CDSOA's support requirement to be invalid on the ground that the government had less restrictive means of achieving any interests in compensating injured domestic producers and rewarding those who supported government enforcement efforts. *Id.* at 94a; see *id.* at 80a-84a.

7. The court of appeals denied rehearing en banc over Judge Linn's dissent, which was joined by three other judges. Pet. App. 101a-108a.

ARGUMENT

Petitioner (Pet. 12-38) contends that the distribution scheme established by the CDSOA, under which industry participants who support an antidumping petition are entitled to a share of any duties collected while participants who oppose the petition are not, violates the First Amendment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. The question presented is also of limited prospective significance, since the CDSOA was repealed in 2006 and applies only to a diminishing pool of antidumping duties collected on goods that entered the United States before October 1, 2007. Further review is not warranted.

1. The court of appeals upheld the CDSOA based on its conclusion that the CDSOA was designed not only to compensate those members of domestic industry that are injured by unfair trade practices, but also "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." Pet. App. 33a. Although the statute's purpose to compensate injured parties provides a sufficient basis for upholding the CDSOA, the court correctly concluded that a purpose to reward those who assist in the enforcement of federal law is also a valid objective under the First Amendment. See *id.* at 31a-51a.[3]

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[3] The government argued in the court of appeals that, in enacting the CDSOA's support requirement, Congress sought to distribute govern-

As the court of appeals correctly noted, "it is now common for the government to reward those who assist in enforcing government policies through litigation or administrative proceedings," Pet. App. 41a, through such mechanisms as "qui tam proceedings, monetary awards of a portion of the government's recovery, and awards of attorney's fees," *id.* at 44a. Such reward provisions serve substantial governmental interests both in compensating injured parties and in rewarding assistance in enforcing federal law. Nothing in this Court's cases casts doubt on the government's authority to reward successful parties without extending the same benefits to those who unsuccessfully opposed the granting of relief. Cf. *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 537 (2002) ("[N]othing in our holding today should be read to question * * * the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.").

The cases on which petitioner relies (Pet. 14-15) are not to the contrary. Neither *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995),

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ment funds to those domestic producers who had been most severely harmed by dumping, and that Congress viewed a producer's support for an antidumping petition as evidence of likely harm. See Pet. App. 30a. The court of appeals agreed with the government that "the Byrd Amendment was designed to compensate domestic producers." *Id.* at 29a. It disagreed, however, with the government's contention that this was the statute's "*only* purpose," *id.* at 30a, finding that the CDSOA was also intended in part "to reward injured parties who assisted government enforcement of the antidumping laws," *id.* at 33a. Although compensation of injured domestic producers provides a sufficient rationale for upholding the CDSOA against petitioner's First Amendment challenge, the court of appeals was correct that rewarding persons who assist in the enforcement of federal law is a constitutionally valid objective.

nor *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), nor *Speiser* v. *Randall*, 357 U.S. 513 (1958), concerned the government's power to reward parties who assist successful efforts to enforce federal law—or, alternatively, the government's power to deny benefits to those who, like petitioner, oppose such efforts. In *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), see Pet. 34, this Court struck down a statute that prohibited government-funded legal services attorneys from undertaking efforts "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." 531 U.S. at 538, 549. But as the court below correctly noted, the *Velazquez* Court's conclusion that the government may not limit the scope of arguments that may be made by an attorney speaking on behalf of a private client, see *id.* at 542, 547-549, casts no doubt on the government's authority to "reward those who assist in supporting the validity of federal statutes" in the course of litigation or administrative proceedings. Pet. App. 43a.

2. Petitioner raises several challenges (Pet. 17-24) to the court of appeals' conclusion that the CDSOA is in fact designed to reward parties who assisted government enforcement of the antidumping law. None of those challenges merits this Court's review.

First, petitioner contends (Pet. 17-20) that the court of appeals invented "a benign legislative purpose" that is not evident on the face of the CDSOA. But in concluding that the CDSOA was designed to reward enforcement assistance, the court relied on the language of the CDSOA provisions that established the challenged distribution scheme, as well as on statutory findings that emphasized Congress's intent "to strengthen enforcement of the trade laws." Pet. App. 33a. The court of appeals'

approach is thus consistent with "this Court's teaching that the 'purpose, or justification, of a regulation will often be evident on its face.'" Pet. 17 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994)).

Petitioner next contends (Pet. 21-22) that the court of appeals erred in concluding that the CDSOA was designed to reward enforcement assistance, even though the government had argued that the CDSOA was designed solely to compensate those injured by dumping. Petitioner's contention relies primarily on *Thompson* v. *Western States Medical Center*, 535 U.S. 357 (2002), in which this Court rejected a justification for speech-related statutory restrictions that had been raised by the dissenting Justices but not by counsel for the government. *Id.* at 373. The Court in *Thompson* explained that, while it had "sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational," the heightened standard of scrutiny applicable in that case required the government not only to identify a "substantial interest," but "also to prove that the regulation directly advances that interest and is not more extensive than is necessary to serve that interest." *Id.* at 373-374 (internal quotation marks and citations omitted). The Court rejected the dissent's proposed justification on the ground that the government had "not met any of these requirements with regard to the interest the dissent describes." *Id.* at 374. The Court did not, as petitioner suggests, hold that a court is limited to considering those legislative purposes advanced in the government's briefs.

Finally, petitioner contends (Pet. 22-24) that the "'reward' purpose is entirely fictitious" because "petition supporters and petition opponents provide exactly the same assistance to the government in antidumping inves-

tigations." Pet. 23 (quoting Pet. App. 72a). Petitioner is correct that petition opponents, like petition supporters, may provide important information to the ITC during its antidumping investigations. See Pet. App. 48a. But as the court of appeals observed, "[o]pposing parties' interests lie in defeating the petition, typically (as is the case here) because the domestic industry participant is owned by a foreign company charged with dumping." *Ibid.* Congress may permissibly decline to reward parties who have unsuccessfully opposed the granting of particular relief, and thus have failed to provide the *type* of assistance that Congress wishes to reward, even when those parties have provided relevant information during the course of the proceedings. See *id.* at 50a-51a. In any event, the statute-specific question petitioner raises does not merit this Court's review, particularly in light of the fact that the statute was repealed years ago. See p. 4, *supra*.

3. Petitioner contends (Pet. 24-26, 31-33) that the decision below implicates a conflict in authority about the proper definition of "commercial speech" under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). That argument reflects a misunderstanding of the court of appeals' analysis. Contrary to petitioner's apparent premise, the court below did not hold that domestic manufacturers' responses to the ITC's questionnaires actually constituted "commercial speech" for purposes of the *Central Hudson* inquiry. Instead, using commercial-speech regulation as an analogy, the court drew on the *Central Hudson* framework to determine the proper standard of review for determining "when, if ever," rewards for assistance in government enforcement efforts "would be forbidden by the First Amendment." Pet. App. 39a. Notably, the court empha-

sized that the same result would obtain if it applied "the test for speech combined with conduct in *United States* v. *O'Brien*." *Id.* at 40a n.28; see *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). Petitioner identifies no conflict about the proper application of commercial-speech doctrine that warrants this Court's intervention.

4. Finally, petitioner contends (Pet. 27-31) that this Court's review is warranted to resolve a conflict among the courts of appeals as to the standard of scrutiny that applies to regulations rewarding support for government action. Petitioner is incorrect.

In *Lac Vieux Desert Band of Lake Superior Chippewa Indians* v. *Michigan Gaming Control Board*, 172 F.3d 397 (1999), the Sixth Circuit held that strict scrutiny applied to a Detroit ordinance that gave bidding preferences to casino developers that had been involved in "actively promoting and significantly supporting a state initiative authorizing gaming." *Id.* at 409 (internal quotation marks, citation, and brackets omitted). But as the court of appeals in this case correctly explained, "[t]he ordinance at issue in *Lac Vieux* did not reward the achievement of the enforcement of government policy through litigation, but instead involved 'political support' for legislative efforts." Pet. App. 44a n.32. The court of appeals' conclusion that rewards for assistance in government enforcement efforts are subject to less search-

ing constitutional review creates no conflict with the Sixth Circuit's ruling in *Lac Vieux*.

Nor does the decision below conflict with *Hoover* v. *Morales*, 164 F.3d 221 (5th Cir. 1998). In *Hoover*, the court of appeals preliminarily enjoined, as presumptively invalid, a policy that barred professors at a state university from serving as consultants or expert witnesses on behalf of parties opposing the State in litigation. *Id.* at 227. The state policy at issue in that case bears little resemblance to the CDSOA, which does not forbid parties from expressing particular viewpoints. Cf. Pet. App. 32a (explaining that "[p]arties who are awarded antidumping distributions under the Byrd Amendment may say whatever they want about the government's trade policies generally or about the particular antidumping investigation, provided they do so outside the context of the proceeding itself").[4]

5. In any event, the merits of petitioner's as-applied challenge are of limited prospective significance because the CDSOA has been repealed. Even if, as petitioner argues (Pet. 33-34), the CDSOA may once have had a "chilling effect" in antidumping proceedings, all of the ITC questionnaire responses upon which CDSOA eligibility determinations were made were submitted years ago (in this case, more than 20 years ago). There is con-

[4] Petitioner also contends (Pet. 30-31) that the decision below conflicts with *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), *ACLU* v. *City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), and *State* v. *Musser*, 721 N.W.2d 734 (Iowa 2006). None of those decisions, however, addressed the standard of scrutiny that applies to a governmental reward for successful enforcement efforts. See *Solantic*, 410 F.3d at 1274 (content-based prohibition on certain types of signs); *ACLU*, 466 F.3d at 797 (content-based prohibition on certain forms of solicitation); *Musser*, 721 N.W.2d at 743-744 (statute effectively requiring disclosure of speaker's HIV status).

sequently no possibility that the decision below could affect the behavior of industry participants in any pending or future antidumping proceedings. As applied in this case, moreover, the challenged distribution scheme could not have affected industry participants' decisions whether to support or oppose the Torrington Company's antidumping petition, since the questionnaires submitted in connection with that petition were completed several years before Congress enacted the CDSOA. And while petitioner contends (Pet. 36) that "[t]he mere possibility that Congress could reenact the statute * * * chills free speech," such a speculative possibility provides insufficient grounds for this Court's review.

Petitioner also contends (Pet. 35) that this Court's review is warranted because duties on goods that entered the United States before October 1, 2007, continue to be distributed to persons who supported, but not those who opposed, the relevant antidumping petitions. But the monies remaining to be distributed with respect to pre-October 2007 entries are significantly less than the $1 billion figure petitioner cites, and are steadily diminishing.[5] And those figures include monies that would be distributed to a considerable number of petition supporters, not only monies that would be distributed to petition opponents like petitioner and its amici if petitioner were to prevail on its challenge.

Finally, petitioner's reliance (Pet. 36 n.20) on *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974), and *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), is misplaced. Petitioner is correct that the repeal of the

[5] The most recent CBP statement of the CDSOA clearing account balances, as of October 1, 2009, can be viewed at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/balances.ctt/balances.pdf.

CDSOA does not render this case moot for Article III purposes, since petitioner would derive a tangible benefit if it were held to be entitled to a share of the fiscal year 2005 antidumping duties at issue in this case. See *Alco Parking*, 417 U.S. at 372 n.2; *Fulton Corp.*, 516 U.S. at 327 n.1. But petitioner identifies no persuasive reason for this Court to review the constitutionality of a now-repealed statute, where the case presents no "familiar and recurring" issues, *Alco Parking*, 417 U.S. at 373, of particular importance outside the narrow statutory context at issue.

6. Although the ITC sent Customs the list of entities eligible for CDSOA distributions in December 2000, and Customs published the list in August 2001, petitioner did not file a complaint until October 2005. In the court of appeals, the ITC and respondent Timken argued that petitioner's suit was barred by the applicable two-year statute of limitations. See 28 U.S.C. 2636(i). The court of appeals, while assuming (without deciding) that Section 2636(i)'s limitations period is jurisdictional, held that the suit was timely because petitioner's cause of action did not accrue until June 1, 2005, when Customs published its notice of intent to distribute duties for fiscal year 2005. Pet. App. 23a-26a.

The Court's decision in *Lewis* v. *City of Chicago*, No. 08-974 (argued Feb. 22, 2010), may bear on the proper resolution of the timeliness issue in this case. If this Court were to grant the petition for a writ of certiorari, it might ultimately be foreclosed from deciding the merits of petitioner's constitutional claim if the Court found that claim to be time-barred. The existence of this potential jurisdictional barrier provides a further reason for this Court to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

This case raises an important First Amendment issue that divided the Federal Circuit: whether the federal government may limit its largesse to those who express support for a government investigation. The Continued Dumping and Subsidy Offset Act ("CDSOA" or "Byrd Amendment") denies federal funds to any applicant that failed to express support for an antidumping petition. (App. 160a-169a). The statutes' plain text differentiates speakers by viewpoint and distorts expression in the very forum established to weigh those competing views.

Respondents' defense of the ruling below only highlights the CDSOA's constitutional infirmities. Respondents liken the CDSOA to other litigation management tools governing the conduct of parties to judicial proceedings. But in none of those contexts is relief triggered by expression of particular viewpoints — or any speech content. Only by reformulating the CDSOA to deemphasize the central role played by expression in its regulatory scheme can respondents escape the strict scrutiny routinely applied to government viewpoint discrimination.

Respondents erroneously suggest that there is something unique about litigation that distinguishes it from the numerous contexts where viewpoint-discrimination is presumed invalid. But statutes that "exclude from litigation those arguments and theories Congress finds unacceptable" are no more permissible under the First Amendment than other viewpoint discriminatory schemes invalidated by this Court. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001).

Respondents rely upon a wholly hypothetical statutory purpose to circumvent First Amendment strict scrutiny. The government argues that the statutory purpose adopted below — rewarding parties that assist successful investigations — is a "constitutionally valid objective." Gov't Opp. 10-11 n.3. But it does *not* state that rewarding assistance was the statute's *actual* purpose. The government "repeatedly" denied that statutory purpose below, for good reason. (App. 65a). Response to an antidumping questionnaire is compelled by law. (App. 72a). It is nonsensical to suggest that the remedial purpose of trade laws is strengthened by providing a monetary "reward" to those already required to "assist" an investigation.

Governmental viewpoint discrimination is a matter of significant public import, and respondents cannot claim otherwise. Instead, they downplay the significance of this case principally because the statute has been repealed. Respondents admit that the repeal does not compel the denial of *certiorari*. And they overlook that the repeal was only partial; the viewpoint-discriminatory impact of the statute will be felt by a range of speakers for years to come.

Respondents do not provide a compelling reason for denying *certiorari*. This Court should grant the petition to reaffirm the important First Amendment principles at stake and correct the erroneous decision of the Federal Circuit.

ARGUMENT

I. Respondents Cannot Avoid the CDSOA's Viewpoint Discrimination

1. The CDSOA's viewpoint discrimination is patent. Both in plain language and effect, the statute limits benefit eligibility to those who publicly express support for an antidumping investigation. Respondents contend that the CDSOA's patent viewpoint discrimination can be ignored because Congress did not *intend* to burden speech in choosing a preferred viewpoint as a requirement for compensation. But when a statute makes such facial viewpoint distinctions, a court cannot look the other way. (Pet. 17-20). This Court does not permit *post hoc* judicial rehabilitation of viewpoint discriminatory statutes: "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010).

Like the majority below, respondents disregard the CDSOA's facial discrimination in favor of a wholly imagined statutory purpose — rewarding assistance of the government's antidumping investigation. For its part, the government never explicitly embraces this statutory purpose. Nor could it, since it emphatically rejected it below. App. 65a-66a. But the government "ought to say if there is merit to [its litigation position] instead of merely suggesting it," especially in the First Amendment context. *See Citizens United*, 130 S. Ct. at 892. Here, the government's defense is grounded in a

statutory purpose that it has affirmatively rejected.[1] Stripped of this artifice, its opposition crumbles.

The government's ambivalence is understandable. The reward purpose is implausible, given that "all members of the affected domestic industry are *required* to submit questionnaire responses, and the [ITC] can issue subpoenas to obtain any information that it needs." App. 106a, 107a (Linn, J., dissenting). Providing a monetary reward does nothing to enhance the participation of producers whose participation is already compelled by law; thus, the "reward" justification is wholly disconnected from the statute's stated purpose of "strengthen[ing]" the "remedial purpose" of federal trade laws. CDSOA, § 1002(5), 114 Stat. at 1544A-73 (App. 161a). The statute's compensation scheme depends not on the "assistance" provided, but on the *viewpoint* expressed in response to the questionnaire's "support" question. This Court's jurisprudence plainly prohibits this viewpoint discrimination. *See* Pet. 14-16.

2. Respondents equate the CDSOA's "support" requirement with other litigation contexts, such as class actions or *qui tam* statutes, in which relief is awarded

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1. The government argues that courts are not limited to purposes that the government endorses. It offers a constrained reading of *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), to suggest that a court may hypothesize purposes for a statute in First Amendment analysis. We are unaware of *any* case where this Court has hypothesized a benign statutory purpose to *avoid* strict scrutiny *entirely*. Where this Court has applied heightened First Amendment scrutiny, numerous cases, including *Thompson*, require the Court to discern the *actual* statutory purpose. *See* Pet. 22.

based on litigation *conduct*. But none of those unrelated litigation tools depend in any measure on the content of protected speech. The grant of *certiorari* in this case will not affect the ability of a court to control the conduct of parties in cases before it.

Respondents' implicit suggestion that the First Amendment has less force in the adjudication (or quasi-adjudication) context than elsewhere is simply false. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972). The government can no more reward a preferred viewpoint in adjudication than it can in funding college newspapers. *Compare Velazquez*, 531 U.S. at 546, *with Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

The CDSOA's support requirement bears no resemblance to these litigation tools. In each, the award of monetary benefits or sanctions depends upon *conduct*, such as filing of suit on behalf of the government or making an election to opt in to a class. The False Claims Act, for instance, grants an award to a *qui tam* relator who successfully *prosecutes* a claim on behalf of the United States, permitting a relator to share in the recovery in an amount "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (2006).

By contrast, the fulcrum of the CDSOA's support requirement is the *expression* of opinion. The CDSOA does not limit relief to those who "opt in" to the group

seeking relief,[2] but instead, ties relief to the expression of "support" for the petition. 19 U.S.C. §§ 1675c(b)(1)(A), (d)(1) (2000) (limiting award to producers who speak in "support of the petition" by "letter or through questionnaire response") (App. 162a, 165a). The government conceded below that the CDSOA is "'not that similar'" to *qui tam* cases. (App. 87a) (Linn, J., dissenting). The litigation analogs do not save the CDSOA from invalidity.

II. Respondents Fail To Explain The Conflict In The Lower Courts

The petition explains that the decision below conflicts with decision of other circuits in similar circumstances. (Pet. 26-33). Respondents seek to distinguish the most analogous case — *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) — by arguing again that the litigation context is somehow different. *See* Gov't Opp. 15; Timken Opp. 25. But for the reasons already stated, litigation offers no refuge for viewpoint discrimination. *Lac Vieux* is in direct conflict with the decision below. *See* Pet. 27-29.

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2. Timken's suggestion that the support requirement merely rewards those who "opt in" to the relief sought in an antidumping petition mischaracterizes antidumping investigations. An antidumping petition is filed "'on behalf of an industry,'" meaning "'the domestic producers as a whole of a like product,'" not on behalf of an individual producer. (Timken Opp. 4). The antidumping statute thus seeks to remedy injury to the whole domestic industry. *See* 19 U.S.C. §§ 1673, 1673a (2006). Petition supporters do not "elect" to be included in the class seeking relief; nor can those opposing a petition "elect" to be excluded.

Respondents both mischaracterize *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998), and fail to appreciate its significance. *Hoover* concerned a state appropriations statute that withheld funding for state employees who offered expert testimony against the state. *Id.* at 223-24. It was not a complete ban on speech. *See* Gov't Opp. 16; Timken Opp. 26. *Hoover* conflicts with the court of appeals' reasoning that viewpoint discrimination is more tolerable in the litigation context.

Oddly, respondents argue that lower court confusion in the application of the commercial speech doctrine does not justify review here. Both respondents concede that the court below applied intermediate "commercial speech" scrutiny. But neither respondent argued below that the commercial speech doctrine was applicable, and Timken US Corporation ("Timken") expressly asserted that it was not. App. 79a (Linn, J., dissenting). Respondents claim there is no conflict created by the decision below, however, because this case actually has nothing to do with commercial speech. That a court of appeals would apply commercial speech analysis to a statute that all parties recognize has nothing to do with commercial speech only reinforces the need for review here. *See* App. 107a (Linn, J., dissenting).[3]

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3. SKF USA does not concede that the CDSOA would survive intermediate scrutiny. Even under commercial speech standards, the government may not discriminate against viewpoint. *R.A.V v. City of St. Paul*, 505 U.S. 377, 388-89 (1992). As Judge Linn concluded below (App. 80a-81a), Congress could conceivably have furthered the remedial purposes of the trade laws in a manner that does not depend upon the content of speech.

III. Respondent Timken's Remaining Arguments Do Not Support Its Position

1. Timken attempts to denigrate the value of SKF USA's expressed viewpoint, emphasizing that SKF USA's foreign affiliates were among the exporters on which antidumping duties were imposed. It contends "there is no injustice in giving the CDSOA its remaining effect" to deny such distributions to affiliated domestic companies. (Timken Opp. 28). Timken sheepishly acknowledges in the margin that its own predecessor (Torrington Company) "had foreign affiliates in one or more of the countries covered by the petition" that were "subject to coverage by the relevant orders." (Timken Opp. 7 n.4). Timken itself has other foreign affiliates that export products subject to similar antidumping orders. Yet Timken does not suggest any injustice in its sharing in CDSOA distributions.

As Timken's receipt of CDSOA distributions illustrates, the CDSOA does not permit the government to deny distributions simply because a qualified domestic producer has foreign affiliates. The test is one of expression, not corporate relationships. But even if the statute did consider such relationships, SKF USA "had no production facilities" in Japan (Timken Opp. 7). SKF USA was not "aligned" with any exporter subject to the antidumping order in this case. The ITC determined that SKF USA is part of the injured domestic industry, a decision that was affirmed on appeal. *See* Pet. 9 n.7.

2. Timken suggests that the petition should be denied on the ground that the CDSOA does not condition distribution of funds on the *public* expression of views,

arguing that a producer's response to an ITC questionnaire is confidential. The ITC's implementation of the CDSOA abrogated that confidentiality, however. As Timken acknowledges (Opp. 6 n.3), petition supporters must waive confidentiality in order to receive CDSOA distributions. An applicant does not qualify without agreeing to the government's publication of the applicant's support for the petition. *See Cathedral Candle Co. v. ITC*, 400 F.3d 1352 (Fed. Cir. 2005). SKF USA itself waived confidentiality in applying for distributions in 2005. (Timken Opp. 6). Its opposition was necessarily made a matter of public record under the CDSOA.

Even if the questionnaire response remained confidential, the question presented would be no less important. The impermissible burden on SKF USA's speech does not depend on whether that speech was intended for the general public. Viewpoint discrimination is equally impermissible where speech is solicited by the government: The government "may not inquire into a man's views . . . solely for the purpose of withholding a right or benefit because of what he believes." *Baird v. State Bar of Arizona*, 401 U.S. 1, 7 (1971). It would be passing strange if the First Amendment tolerated viewpoint discrimination in a forum in which the government's principal role is as neutral factfinder. *See* Timken Br. 17 (agencies have no "predetermined position" on issues).

3. Timken's baseless statute of limitations defense under 28 U.S.C. § 2636(i) should not affect the grant of *certiorari*. The Federal Circuit properly rejected the defense. As Timken acknowledges, that decision should

not be impacted by the "distinct limitations issue" at issue in *Lewis v. City of Chicago*, No. 08-974 (Timken Opp. 32 n.16).

Timken's limitations argument misunderstands both the nature of SKF USA's claim and the operation of the CDSOA. SKF USA challenges the government's denial of CDSOA distributions with respect to a particular fiscal year, 2005. When the CDSOA was enacted in 2000 — and even when the ITC's first list of affected domestic producers was published in 2001 — it was unknown whether any CDSOA distributions would actually be available in any given future year. If, for example, the exporters subject to an antidumping order discontinue dumping, no funds would exist for CDSOA distributions for that fiscal year. *See* App. 25a.

The Federal Circuit thus properly concluded that SKF USA's claim could not accrue until June 1, 2005, when U.S. Customs and Border Protection ("Customs") published its notice of intent to distribute duties for fiscal year 2005. (App. 24a-26a). Before then, SKF USA could not have "known whether Byrd Amendment distributions would be available." (App. 25a). SKF USA's October 2005 complaint was well within the 2-year limitations period. *Id.*

The government does not endorse Timken's statute of limitations defense on the merits, but simply notes that the Court's disposition of *Lewis* "may bear on the proper resolution of the timeliness issue in this case." Gov't Opp. 18. The government actually supported the *Lewis* petitioners in arguing that the statute of limitations at issue there permitted a challenge to the

government's application of the testing scheme years after the test's adoption. In any event, Timken is surely correct that the decision in *Lewis* will not necessarily affect the outcome under the distinct statutory language here. The statute of limitations defense should not impact the *certiorari* decision.

IV. The Petition Presents an Important Constitutional Question

Respondents' opposition does not rebut the critical importance of the question presented. As *amici* confirm, the CDSOA has had a profound impact on the competitive environment in a range of industries. In the furniture industry, CDSOA distributions significantly exceed the annual net operating income for the entire industry in some years. Ashley Furniture *Amici* Br. 7. One furniture company is set to receive 2009 distributions of approximately twice its 2008 net income. *Id.* at 8. In the crawfish industry, one small business was forced into bankruptcy after its domestic competitors used their CDSOA distributions repeatedly to underbid it. Giorgio Foods & PS Chez Sidney *Amici* Br. 5-6.

SKF USA suffers a significant competitive injury as a result of its protected speech. Customs has notified SKF USA that approximately $70 million is set aside for SKF USA for fiscal years 2005-forward. That money will go directly to its domestic competitors if the lower court decision is allowed to stand.

Despite respondents' vague assertions, the overall fiscal impact of the CDSOA's viewpoint discrimination

is significant. Based on figures from Customs' annual disbursement reports,[4] SKF USA estimates that, for 2008-2009 alone, Customs has set aside an additional $150 million to be distributed to the remaining plaintiffs in 48 other cases currently stayed in lower courts.[5] The government could also recoup funds wrongfully paid to affected producers in prior years under 19 C.F.R. §159.64(b)(3) (2009).

The CDSOA's burden on speech will continue to be felt as long as duties collected under orders subject to its terms are disbursed. *See* Pet. 35-36.[6] The uncertainty that the Federal Circuit's decision injects into this important segment of the national economy itself is cause for review.

The partial repeal of the CDSOA does not diminish the importance of the First Amendment challenge.[7] The

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4. *Available at* http://www.cbp.gov/xp/cgov/trade/ priority_ trade/add_cvd/cont_dump/.

5. Prior years' amounts also count in the millions, but cannot be determined from public reports.

6. On April 14, 2010, the European Union announced that it would resume retaliatory tariffs against the country's use of the Byrd Amendment. *See* http://eur-lex.europa.eu/LexUri Serv/LexUriServ.do?uri=OJ:L:2010: 094:0015:0018:EN:PDF (EU Commission announcement).

7. Timken asserts (Opp. 26) that the partial repeal counsels against certiorari. Two of its cases concerned non-constitutional challenges to statutes that were completely (not partially) repealed and replaced with new laws. *See Dist. of Columbia v. Sweeney*, 310 U.S. 631 (1940) (meaning of "domiciled" in repealed

(Cont'd)

government confirms the continuing coercive power of the statute by highlighting that the questionnaire responses were submitted years ago. (Gov't Opp. 16). The retroactive application of this statute to responses submitted more than a decade before its enactment creates a continuing chill on protected speech. The message to industry is clear: today's questionnaire responses could someday determine tomorrow's eligibility for significant monetary distributions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Cont'd)

tax statute); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971) (interpretation of federal-aid highway statute). A third did not concern a repealed statute at all *See Rice v Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955) (post-grant discovery of state statute providing remedy for alleged discrimination).

No. 09-767

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF ASHLEY FURNITURE INDUSTRIES INC., STANDARD FURNITURE MANUFACTURING CO., INC., ORLEANS FURNITURE, INC., AND KIMBALL FURNITURE GROUP, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are American furniture producers that have been denied distributions of antidumping duties collected pursuant to the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), because of their failure to support the petition leading to the imposition of antidumping duties upon Chinese wooden bedroom furniture. Amici have filed suit in the Court of International Trade challenging the constitutionality of that restriction under the First and Fifth Amendments. Those suits have been stayed pending the disposition of this case. Amici have a significant interest in the question presented by petitioner, as the Court's disposition of the petition may determine the outcome of amici's pending litigation.

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondents received timely notice of amici's intent to file this brief and have consented to its filing in letters on file with the Court.

SUMMARY OF ARGUMENT

The petition in this case presents an issue of lasting significance to a great many industries, including American furniture manufacturers. The hundreds of millions of dollars at stake not only have immediate consequences for the financial health of companies employing thousands of workers, but will effect the competitive position of companies within the industry for decades to come as those receiving the distributions are given an opportunity to invest in technologies and in their workers that has been denied to others solely on the basis of their speech.

In recent years, the American furniture manufacturing industry has been engaged in a rigorous debate over the best way to respond to the increasing competitive pressures of globalization. Some have sought barriers to the importation of low-cost imports from abroad, including by bringing or supporting a petition to impose antidumping duties on wooden bedroom furniture imported from China. Others have resisted protectionist impulses and attempted instead to strike a balance by importing some of the furniture they sell (or furniture components) from overseas while continuing to manufacture other products here in the United States. While facing the same pressure from Chinese imports, many domestic furniture companies concluded that the risks and costs of pursuing antidumping duties – including the risk of triggering a trade war and the possibility of reducing overall demand for furniture from all sources by increasing the cost of imported furniture and components – was greater than any likely benefit. As a result, even

though willing to fully cooperate with the Government's antidumping investigation, and even though suffering comparable injuries from the unlawful imports, some companies nonetheless declined to support the antidumping petition.

That exercise of core political speech is punished by the Byrd Amendment in a way that chills public debate on one of the great economic and political questions of our times. How best to respond to the pressures of globalization is a perennial topic of debate, protest, and legislation. The Byrd Amendment rewards those taking one view of the question – those supporting the Government's ultimate decision to impose antidumping duties – with the effect of not only denying a benefit to those who disagree with that decision, but also imposing an affirmative harm on the dissenters by subsidizing their competitors.

The court of appeals wrongly refused to subject that viewpoint discrimination to strict scrutiny. The court also erred in concluding that disagreement with the Government's antidumping decision could be used as a proxy for measuring the degree of assistance provided to the Government's investigation. In fact, in the Chinese wooden bedroom furniture investigation, amici and other dissenters provided as much, and sometimes more, information to the International Trade Commission, as did those who were given Byrd distributions. Nor, contrary to the Government's assertion below, could Congress have concluded that disagreement with the imposition of antidumping duties indicates that the dissenters were harmed less by the unlawful trade practice than those who expressed public support for

the Government policy. As described already, those harmed by unfairly priced imports could have any number of legitimate reasons for declining to support an antidumping petition.

Finally, the fact that the Byrd Amendment has been repealed should not shelter the court of appeals' erroneous and harmful decision. This Court has frequently granted certiorari to decide questions relating to repealed statutes when the legislation has significant and continuing consequences. The Court should do so again here.

ARGUMENT

I. The Petition Presents A Question Of Exceptional And Lasting Importance To The Domestic Furniture-Making Industry.

The petition in this case raises an issue of great importance to amici and other American producers of wooden bedroom furniture, affecting the distribution of millions of dollars in antidumping duties that will have a profound effect on the financial health and competitive position of companies within an industry that employs tens of thousands of American workers. The harmful effects of the decision below will continue to be felt long after the repeal of the Byrd Amendment and can only be remedied by this Court.

A. Background Of Chinese Wooden Bedroom Furniture Antidumping Duties

In October, 2003, a group of American furniture manufacturers and labor unions filed a petition with the International Trade Commission (ITC) and

Department of Commerce alleging that Chinese companies were dumping wooden bedroom furniture at less than fair value into United States' markets and that the domestic industry was being injured as a result. *See* U.S. International Trade Commission, *Wooden Bedroom Furniture from China* 1, Investigation No. 731-TS-1058 (Dec. 2004) (ITC Report).[2]

While the Commerce Department investigated whether Chinese imports were being sold at less than fair value, the ITC inquired whether the alleged dumping was materially injuring the domestic industry. As part of its investigation, the ITC sent domestic firms a questionnaire. Of the companies responding, 38 supported the petition, nine opposed it, and seven took no position. *Id.* at 17-18. While the companies supporting the petition were more numerous, they accounted for a little more than one-third of the domestic production; those opposing or taking no position on the petition accounted for the other approximately two-thirds of domestic production. *Id.*[3] Even those who opposed the petition or took no position actively participated in the investigation, providing the ITC with voluminous

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[2] A public version of the report, with certain proprietary information redacted, is available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2003/wooden_bedroom_furniture/final/PDF/woodenbedroomfurniturefinal.pdf.

[3] These figures measure domestic production by number of pieces of furniture shipped. *Id.* Measured by value, those supporting the petition accounted for roughly half of domestic production. *Id.*

data critical to its determination. *See, e.g., id.* at III-2 – 5 (breaking down responses by firms' position on petition).

At the conclusion of their respective investigations, the Department of Commerce found that Chinese companies were, in fact, dumping wooden bedroom furniture into United States' markets, and the ITC found that the dumping was causing an injury to domestic producers. *See* Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China, 70 Fed. Reg. 329 (Jan. 4, 2005). The Government accordingly imposed, and then began to collect, antidumping duties for distribution to domestic companies in accordance with the Byrd Amendment.

Although the ITC obtained substantial assistance from domestic furniture producers who supported, opposed, or took no position on the investigation, it was constrained by law to designate only those who expressed public support for the petition as eligible to receive Byrd distributions. *See* 19 U.S.C. § 1675c(d)(1) (2006). Amici subsequently challenged the ITC's failure to designate them as eligible for Byrd distributions through complaints filed in the U.S. Court of International Trade. The litigation in each of these cases has been stayed pending, ultimately, the disposition of the petition in this case.

B. The Financial Penalty Imposed On Amici Because Of Their Speech Is Significant And Will Have Lasting Consequences.

The petition in this case presents a question of critical importance to the domestic furniture manufacturing industry, both because of the magnitude of the funding at stake and because of its long-lasting competitive consequences.

1. The total amount of antidumping duties liquidated on Chinese wooden bedroom furniture, subject to distribution under the Byrd Amendment, since the duties took effect in 2005, is approximately a quarter of a billion dollars.[4] In 2009 alone, the Government allocated more than $65 million to eligible domestic furniture manufacturers. *See* U.S. Customs and Border Protection, *FY 2009 CDSOA Annual Disbursement Report* 123 (FY 2009 CDSOA Disbursement Report).[5]

To put these figures in perspective, the $65 million available for distribution is significantly more than the entire industry's operating income in 2003.

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[4] The Government's annual disbursement reports for fiscal years 2001 through 2009 are available at http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/.

[5] *Available at* http://www.customs.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf. The Government distributed approximately $27 million and withheld about $37 million pending the resolution of amici's challenges to the constitutionality of the Act. *Id.*

ITC Report 25. On the level of individual firms, Stanley Furniture Company is slated to receive nearly $7.5 million for FY 2009. *See* FY 2009 CDSOA Disbursement Report at 123. That is approximately twice its reported net income for 2008. *See* Stanley Furniture Co., Inc., *Annual Report to the Securities and Exchange Commission* 11 (Feb. 2, 2009) (Stanley 2008 Report).[6] In fact, in 2008, Stanley's actual sales generated an operating loss of $3.8 million. *Id.* It was only because the company received nearly $11.5 million in CDSOA payments that it was able to report a positive net income that year. *Id.*

2. Although the Byrd Amendment has now been repealed, distributions will continue under the statute for some time to come, and the competitive effects of its unconstitutional viewpoint discrimination will be felt within the domestic furniture production industry for years.

The Government is presently withholding more than $137 million in Byrd distributions for the domestic wooden bedroom furniture industry pending the conclusion of the various cases challenging the constitutionality of the Act.[7] Although the statute was repealed in 2005, duties collected on merchandise entering the United States before October 1, 2007 will still be distributed in accordance with the Byrd Amendment. *See* Pub. L. No. 109-171, Title VII, § 7601(a), 120 Stat. 4, 154 (2006).

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[6] *Available at* http://www.stanleyfurniture.com/media/document/10k020209FINAL.pdf

[7] *See* reports cited in fn. 5, *supra*.

Moreover, as the Government recently explained, duties collected prior to October 2007 are not available for distribution "until the entry is liquidated pursuant to the direction of the Department of Commerce and the duty is collected and deposited into the special account." Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814, 25,814 (May 29, 2009). The process for liquidating duties previously assessed, and litigating any resulting challenges, can take years. As a result, the Government anticipates that "the distribution process will be continued for an undetermined period." *Id.*

Moreover, the effects of the Byrd Amendment's unconstitutional preference for those expressing public support for the Government's imposition of duties will last far longer. The hundreds of millions of dollars already distributed have given amici's competitors a significant competitive advantage. For five years, the Government has provided those who supported the petition millions of dollars each year to pay for basic costs of operations, including the cost of equipment, facilities, training, health care and pension benefits, raw materials, and capital. *See* 19 U.S.C. § 1675c(b)(4) (2006). The example of Stanley Furniture Company again provides some perspective. In 2008, the company's CDSOA distribution covered the entirety of its capital expenditures, interest costs,

and income taxes, with more than $5 million left over to cover other expenses.[8]

These payments have allowed companies that engaged in Government-favored speech to invest more in capital improvements, machinery, and human resource development than they would have been able to absent the Byrd payments, even while their competitors (whose speech the Government disfavored) have struggled to maintain the level of investment needed to effectively compete in a challenging economic environment. Stanley Furniture Company's CEO has explained that the CDSOA payments have allowed the company to "reinvest in our people, processes and four manufacturing facilities, allowing us to ... grow our business." Heath E. Combs, *Duties Often Reinvested: Some Antidumpers Won't Comment*, FURNITURE TODAY, Apr. 22, 2007.[9] Likewise, Vaughan-Bassett Furniture Company has stated that it also spent its distributions on capital expenditures. *Id.* The company spent some $5 million of its CDSOA payments to develop a new quick-delivery system, while also making investments in new equipment (including new computerized routers), expanded warehouse capacity, and improved processes to deliver greater lumber yields. *Id.*

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[8] *See* Stanley 2008 Report (for 2008, reporting $2.261 million in capital expenditures, $3.211 million in interest costs, $998,000 in income taxes, and $11.485 million in CDSOA distributions).

[9] *Available at* http://www.furnituretoday.com/article/40835-Duties_often_reinvested.php.

Other recipients made similar investments. *See* Thomas Russell *Antidumping Duties Boost Incomes: Some Recipients Plan To Reinvest Money*, FURNITURE TODAY, Dec. 18, 2006 (Stickley Furniture also reported plans to increase spending on capital projects in the wake of receiving Byrd funds);[10] *id.* (CEO of Century Furniture stating that the funds were being spent "to make [the] business more competitive"); Heath E. Combs, *Smaller Duty Recipients Look To Capital Projects*, FURNITURE TODAY, Apr. 22, 2007 ("Manufacturers receiving smaller antidumping disbursements report the duties are helping them fund capital improvements.");[11] General Accounting Office, *International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act* 33 (Sep. 2005) (in survey of top CDSOA recipients one company reported using funds for "substantial investments in its factory and workers" while another found payments "helpful in justifying continued investment during periods when prices are depressed").[12]

Unless corrected, that competitive advantage will continue long after the distributions under the Byrd Amendment have ceased, as amici's competitors continue to enjoy the benefits of investments and

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[10] *Available at* http://www.furnituretoday.com/article/39056-Duties_boost_incomes.php.

[11] *Available at* http://www.furnituretoday.com/article/40860-Smaller_duty_recipients_look_to_capital_projects.php.

[12] *Available at* http://www.gao.gov/new.items/d05979.pdf.

capital improvements made in part with Byrd Amendment funds

II. The Court Of Appeals' Decision Is Wrong.

A. A Firm's Public Expression Of Support For, Or Opposition To, An Antidumping Investigation Is Entitled To Maximum First Amendment Protection.

Amici's disagreement with the Government's decision to impose the duties is precisely the kind of speech on issues of public interest the First Amendment was designed to protect. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, No. 08-205, slip op. at 25-26 (U.S. Jan. 21, 2010); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Calif.*, 475 U.S. 1, 8-9 (1986).

1. The antidumping petition proved highly controversial within the domestic furniture industry. One industry observer wrote at the time that the petition "is literally tearing the furniture industry apart." Rich Christianson, *Furniture Industry in Turmoil*, WOOD & WOOD PRODUCTS, Dec. 2003 (*Turmoil*).[13] The disagreements focused on some of the most essential political and economic debates of our times. For a number of years, globalization forced the domestic industry to face increased competition from manufacturers in other countries –

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[13] *Available at* http://woodworkingnetwork.com/Furniture-Industry-in-Turmoil/2006-10-12/Article.aspx?oid=961271&aid=79.

including China, Taiwan, India, and Indonesia – with plentiful low-cost labor. American firms took different approaches to that challenge. Some responded by seeking increased barriers to foreign imports, including by seeking the antidumping duties at issue in this case. Others responded by entering into joint ventures in China and elsewhere, producing some particularly labor-intensive furniture abroad while focusing domestic production on more capital-intensive lines of products. *See, e.g.*, Rich Christianson, *One on One: Sizing Up the Furniture Manufacturing Landscape*, WOOD & WOOD PRODUCTS, Mar. 2004 (*One on One*);[14] Stefan Wille, *Antidumping Petition Against the Chinese Furniture Industry: An Economist's Point of View*, WOOD & WOOD PRODUCTS, Oct. 2006 (*Economist's Point of View*) (noting that "[m]ost of the Chinese furniture exports to the United States stem from manufacturers with close ties to American buyers").[15] Thus, about half of the domestic firms responding to the Commission's questionnaire reported directly importing wooden bedroom furniture from China. ITC Report at IV-9 (twenty-six firms reported importing from China); *id.* at I-3 (forty-nine firms responded to questionnaire). This included several of the petitioning companies. *See* Transcript of ITC Hearing at 65-8, *Wooden*

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[14] *Available at* http://woodworkingnetwork.com/One-on-One-Sizing-Up-the-Furniture-Manufacturing-Landscape/2006-10-12/Article.aspx?oid=934451&aid=79.

[15] *Available at* http://woodworkingnetwork.com/Antidumping-Petition-Against-the-Chinese-Furniture-Industry-An-Economist-s-Point-of-View/2006-10-12/Article.aspx?oid=961057&aid=1648.

Bedroom Furniture from China, Inv. No. 731-TA-1058 (Nov. 9, 2004) (statements by representatives of Vaughan-Bassett, American of Martinsville, Bassett Furniture, Michels & Co. and Pilliod, Sandberg Furniture and Moosehead Manufacturing acknowledging present or past imports from China).[16] Indeed, Commissioner Hillman of the ITC herself highlighted this phenomenon, noting "the huge volume of imports by domestic producers and given the degree to which there has been this significant shift away from solely U.S. manufacturing." *Id.* at 149.

Domestic companies that responded to the competitive pressures of globalization by diversifying their production were less likely to support the petition. ITC Report at 29. Some doubted whether dumping was to blame for the low prices of Chinese furniture, noting that "the prices we are paying for products out of China are generally comparable to those being paid for products out of other countries in the Far East." Susan Lorimor, *Filing of Furniture Antidumping Petition Sparks Controversy*, WOOD & WOOD PRODUCTS, Nov. 2003 (*Petition Sparks Controversy*) (quoting industry executive);[17] *see also* Rich Christianson, *Furniture Antidumping Petition Gains Momentum*, WOOD & WOOD PRODUCTS, Aug. 2003 (quoting CEO of one domestic producer as saying that the "offshore producers with whom we do

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[16] *Available at* https://edis.usitc.gov.

[17] *Available at* http://woodworkingnetwork.com/Filing-of-Furniture-Antidumping-Petition-Sparks-Controversy/2006-10-12/Article.aspx?oid=961080&aid=1648.

business are well established and are people of integrity. We have no reason to believe they are engaged in any kind of activity that is unfair or illegal").[18] In addition, even the petition's supporters acknowledged that at least part of the problem was caused not by dumping, but by "China's manipulation of the yuan." *Petition Sparks Controversy*.

Domestic manufacturers further debated whether imposing duties on Chinese furniture would actually help the domestic industry. Some argued that increasing the cost of Chinese imports would simply lead companies to purchase similarly low-cost products from other nations, including Indonesia, India, and Vietnam. *See Furniture Manufacturers and Retailers Face Off*, WOOD & WOOD PRODUCTS, Dec. 2003 (*Face Off*).[19] In addition, some feared that imposition of duties could trigger a wider trade war with China, to the overall detriment to the domestic industry and general economy. *See Economist's Point of View*. And, obviously, increased costs of imports would hurt the bottom line of domestic companies that had made arrangements to manufacture some of their products or components in China. Many concluded that such arrangements were inevitable, if not with China, then with other developing countries. They argued that the petition would simply "distract

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[18] *Available at* http://woodworkingnetwork.com/Furniture-Antidumping-Petition-Gains-Momentum/2006-10-12/Article.aspx?oid=961277&aid=79.

[19] *Available at* http://woodworkingnetwork.com/Furniture-Manufacturers-and-Retailers-Face-Off/2006-10-12/Article.aspx?oid=961259&aid=79.

our industry from the real task of remaining competitive." *One on One.*

Domestic producers also had reason to be concerned that the petition would impair relationships with their retail partners, who strongly opposed it. *See Face Off.* Retailers argued that the duties would increase costs to consumers and depress general demand for all furniture (domestic and imported), leading to a loss of jobs in the retail sector and diminished sales to domestic producers in the long run. *See id.*; *Turmoil.* Retailers made a concerted effort to pressure domestic producers to withhold support from the petition. *See id.*; *see also* ITC Report H-3 (noting that a third of responding domestic producers reported that they had been told by customers that support for the petition "would affect [their] relationship with [the producer's] firm or would affect [their] purchases of wooden bedroom furniture from the firm"). A few large retailers went so far as to stop doing business with producers who supported the petition. *See Face Off* (noting that one retailer severed ties with a domestic manufacturer with whom it had done more than $1 million worth of business in the previous year); Congressional Research Service, THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT ("BYRD AMENDMENT") 24 (Dec. 19, 2005) (noting that "many U.S. furniture manufacturers in support of the investigation speculated that the cost of lost business from U.S. retailers in retaliation for their support may well exceed the combined benefit of the [antidumping]

order and CDSOA disbursements");[20] *Hooker Furniture Withdraws Support For Anti-Dumping Petition; Sites (sic) Industry Divisiveness As Cause*, RTO MAGAZINE, Feb. 16, 2004 (quoting executive of company that initially supported petition as explaining that it had withdrawn its support because "[w]hen we made the initial decision to support the petition, we had no idea how divisive this issue would become in our industry. If we had fully anticipated that, we would have been neutral from the start.").[21]

2. The speech rewarded and punished by the Byrd Amendment is core political speech entitled to the highest degree of First Amendment protection.

The debate within the furniture industry mirrored the broader political debate over the costs and benefits of the Byrd Amendment itself, which eventually led to its repeal. *See, e.g.*, Congressional Budget Office, ECONOMIC ANALYSIS OF THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000 (Mar. 2, 2004); Daniel Ikenson, *Byrd Boondoggle*, NATIONAL REVIEW ONLINE, Dec. 9, 2005;[22] Daniella Markheim, *Time to Repeal the Byrd Amendment*, THE HERITAGE FOUNDATION, Oct. 30, 2005.[23] The court of appeals' decision trivializes

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[20] *Available at http://digital.library.unt.edu/ark:/67531/metacrs8238/m1/1/high_res_d/.*

[21] *Available at* http://www.rtoonline.com/Content/Article/Feb04/HookerBails021604.asp.

[22] *Available at* http://article.nationalreview.com/?q=MzJkZTc4NDExNmUxMjA4NjQwZjNjOWY3ZDUwMWU1ZTE=

[23] *Available at* http://www.heritage.org/Research/tradeandeconomicfreedom/wm900.cfm.

these important public policy disagreements by equating them with ordinary "commercial speech," as if the firms were debating the best brand of mouthwash rather than the proper governmental response to the challenges of globalization. When corporations speak on matters of public concern, they are entitled to full First Amendment protection. *See, e.g.*, *Citizens United*, slip op. at 25-26; *Pac. Gas & Elec. Co.*, 475 U.S. at 8-9; *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 533-34 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-86 (1978).

The court of appeals further erred in concluding that lesser protection was warranted because the statute does not ban opposition to the Government's decision to impose antidumping duties, but rather simply rewards those who supported that policy choice. *See* Pet. App. 28a. The Government may not offer financial rewards to those who support its position to impose antidumping duties any more than it may limit tax cuts to those who expressed political support for that policy. In either case, the Government's preferential treatment of those who support its actions invades the fundamental freedoms the First Amendment protects, and distorts the public debate that Amendment was designed to promote. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Citizens United*, slip op. at 26 (citation omitted). As a result, "[l]aws that burden political speech," be it the speech of individuals or corporations, "are subject to strict

scrutiny." *Id.* at 23 (citation and internal quotation marks omitted).

This is so even if, as the court of appeals assumed, Congress acted with a benign motive, rather than in an attempt to suppress dissent. *See* Pet. App. 28a-29a. As the Court recently made clear, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, slip op. at 23.

B. Neither The Government's Nor The Court Of Appeals' Post-Hoc Justification For The Byrd Amendment's Viewpoint Discrimination Withstands Scrutiny.

The court of appeals and the Government attempt to save a patently unconstitutional statute by hypothesizing that Congress intended to use speech as a proxy for something else. The Federal Circuit concluded that Congress was discriminating on the basis of viewpoint in order to draw distinctions between those who did, and did not, provide substantial assistance to the Government's investigation. Pet. App. 32a-33a. The Government, on the other hand, argued that Congress used support for the petition as a proxy for injury, assuming that only those who supported the petition suffered an injury from any unlawful trade practice eventually substantiated through the investigation. Pet. App. 29a-30a.

Even if either hypothesis were true, that would not save the statute – absent compelling justification, Congress may no more use viewpoint as a surrogate than it may use race as a proxy. Compare *Thompson*

v. W. States Med. Ctr., 535 U.S. 357, 370-73 (2002) (applying strict scrutiny to reject argument that Congress may use a corporation's decision to advertise a product as a "proxy for actual or intended large-scale manufacturing" of compound drugs) *with Johnson v. California*, 543 U.S. 499, 510-11 (2005) (prison regulation using race as a proxy for gang affiliation subject to strict scrutiny). Moreover, as discussed below, the Chinese wooden bedroom furniture investigation demonstrates that neither hypothesis is remotely plausible.

1. Public Expression Of Support For An Investigation Is Not A Proxy For The Level Of Assistance Provided To The ITC's Investigation.

The court of appeals upheld the statute on the assumption that "the purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." Pet. App. 32a-33a. This, the court concluded, was generally consistent with Congress's desire to "strengthen enforcement of the trade laws," *id.*, but it could identify nothing more specific in the text or legislative history of the statute to support its hypothesized legislative purpose. *See id.* at 33-37a. In fact, the court of appeals' invented purpose is belied by the text of the statute and defies common sense.

The court of appeals recognized that its presumed statutory purpose was incompatible with the actual statutory text. Although the court

asserted that Congress intended to discriminate on the basis of viewpoint in order to ensure that only those who substantially assisted in the investigation benefitted from CDSOA distributions, the statute itself requires only that the person "indicate support of the petition *by letter* or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (2006) (emphasis added). Acknowledging that simply filing a letter of support would not assist the Commission in its investigation, the court of appeals judicially excised the offending language from the statute. Pet. App. 36a-37a n.26.

Yet even as rewritten, the statute does not distinguish between those who assist, or refuse to assist, the Commission's investigation. Firms providing exactly the same degree of assistance will either receive or be denied distribution based solely on whether they expressed support for the investigation. Indeed, the statute distinguishes even among those who actually support the petition by allowing distributions only for those who express that support *publicly*. *See* Pet. App. 15a n.9 (noting that although responses to the ITC questionnaire are otherwise confidential, firms are not entitled to Byrd funds unless they waive that confidentiality with respect to their support for the petition).

The court of appeals suggested that public expression of support nonetheless may be a rough proxy for active participation in the investigation. Pet. App. 32a-33a. But as petitioner has explained, *everyone* is required by law to provide the Commission requested information. *See* Pet. 4 (citing 19 U.S.C. § 1333(a) (2006); 19 C.F.R. § 207.8). And the court of appeals pointed to no evidence that those

who do not support the petition can be expected to defy that legal obligation. In the Chinese wooden bedroom furniture investigation, the Commission acknowledged that it received extensive cooperation from non-supporting firms. *See, e.g.*, ITC Report III-3, III-5. For example, amici Ashley Furniture Industries, Inc. and Standard Furniture Manufacturing Co. Ltd. each provided over 100 pages of submissions in response to ITC questionnaires.[24] And in its questionnaire response, Ashley estimated that it spent over 160 hours responding to the ITC's requests for information. Another domestic producer opposed to the petition, Furniture Brands International, Inc., submitted over 60 pages of briefing and related documents and testimony by a company executive.

In fact, in some areas, those who did not support the petition provided *more* information than those who did. For example, more than ten percent of the firms supporting the petition failed to produce requested information regarding capacity, production, and capacity utilization. *See* ITC Report at III-3. The ITC reported, however, that all of the firms opposing or taking no position on the petition provided the requested information. *Id.*

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[24] The confidential questionnaire responses are on file with the ITC.

2. There Is No Relationship Between Support For An Investigation And The Extent Of Harm Suffered.

The Government argued below that Congress limited disbursements to firms that supported a petition not because of any hostility toward those who expressed opposition to the investigation, but rather because Congress sought to use the firms' viewpoint as a proxy for injury suffered as a result of the unlawful dumping. As the court of appeals noted, there is no indication in the text or history of the statute that this was Congress's actual purpose. Pet. App. 29a-30a. Moreover, the Government's hypothesis is implausible on its face, as there is no ground to believe that a firm's position on the merits or wisdom of pursuing an antidumping investigation is an accurate indication of the degree of injury it suffered as a result of any illegal trade practices.

As discussed above, there were multiple legitimate grounds for firms to oppose the Chinese wooden bedroom furniture petition even if the opposing firm had been injured by unlawful competition. An injured firm could well believe that imposition of the duties would do no good because firms would simply start importing from Malaysia or Vietnam, rather than China. Despite suffering the ill-effects of Chinese imports, a firm could also fear that the antidumping investigation could lead to retaliatory action by China or other countries, as, in fact, happened in other cases. *See* Dispute Settlement, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217 (2003) (affirming decision authorizing retaliatory duties by ten countries and the European Union in response to

Byrd Amendment).[25] Further, a company could seek to avoid the inherent overall uncertainty and volatility that antidumping duties create in the marketplace. And firms could conclude that the benefit of the duties would be outweighed by the friction the imposition of antidumping duties would create between domestic producers and retailers, even if the firm was being injured by the imports.

As a result, there is no reason to believe that the Byrd Amendment's viewpoint discrimination results in a distribution of antidumping duties that is significantly correlated with the competitive injury. In fact, the firms that received 100 percent of the Byrd distributions produced only about one-third of pieces of furniture manufactured domestically at the time of the ITC investigation. *See* ITC Report at 17. Surely those who produce the other two-thirds of domestic furniture experienced at least *some* ill effect when faced with exactly the same competitive pressures from low-cost Chinese imports.

To be sure, the Commission found that opposing firms purchased more imports than the companies supporting the petition. ITC Report at 17-18. But the correlation was rough. In fact, some of the companies that supported the petition imported a greater percentage of their products from abroad than did those opposed it. For example, Stanley Furniture Company – which has received more than $31.5 million in Byrd funds[26] – has reported that

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[25] *Available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm.

[26] *See* reports cited in fn. 5.

"[a]pproximately 36% of [its] sales volume in 2008 came from products sourced offshore with The Peoples Republic of China . . . representing the largest volume."[27] In comparison, Furniture Brands International, which publicly opposed the petition and therefore was ineligible for any distributions, stated that at the time the petition was filed, its furniture was "75 percent domestically produced and 25 percent sourced" offshore. *One on One*.

In fact, the Commission found that opposing firms still produced the overwhelming majority of their furniture domestically, ITC Report at IV-13 (among opposing firms, imports represented, on average, less than a third of the companies' output). And the Commission found that importing domestic firms suffered a similar decline during the period in which it concluded that Chinese companies were illegally dumping their products in the domestic market. *See id.* at 27.

III. The Statute's Repeal Should Not Insulate The Court Of Appeals' Erroneous Decision From Review.

For the reasons described above, and in the petition, this case presents an important question of lasting significance worthy of this Court's attention. The fact that the challenged statute has been repealed is no reason to allow the decision to escape review. The Court has granted certiorari in the past

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[27] Stanley 2008 Report 4.

to resolve similarly important questions despite a change in the underlying legal landscape.

For example, the Court has repeatedly granted certiorari to interpret, or decide the constitutionality of, repealed statutes and regulations. As petitioner has noted, the Court granted certiorari to review the constitutionality of a superseded ordinance in *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974). *See id.* at 372 n.2. Similarly, in *Bryson v. United States*, 396 U.S. 64 (1969), this Court granted a petition challenging the validity of a conviction under a statute repealed a decade earlier. *Id.* at 65-66 & n.2. In *Astrup v. INS*, 402 U.S. 509 (1971), the Court decided the effect of Congress's repeal of an exemption from military service on an individual's right to apply for citizenship. And in *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224 (1959), the Court granted certiorari to decide whether repeal of a territorial tax statute extinguished tax liabilities that existed under the statute at the time of its repeal. In all of those cases, it could be argued that the repeal of the statute rendered any question about its continuing impact on a relatively small (and constantly diminishing) number of individuals unworthy of the Court's consideration. Nonetheless, the Court granted review.

Likewise, the Court has taken a number of cases to decide the retroactive effect of a change in the law, even though such questions have only a time-limited importance to a diminishing number of people. For example, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court decided whether certain provisions of the Civil Rights Act of 1991 applied to cases pending when the statute was enacted. *Id.* at

247. The Court has likewise granted review in other cases raising transitional questions about the repeal, amendment, or enactment of federal statutes. *See, e.g.*, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (deciding whether provision of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 applied to individuals who re-entered the United States before the Act's effective date); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (reviewing whether Foreign Sovereign Immunities Act applied to conduct that occurred prior to its enactment); *INS v. St. Cyr*, 533 U.S. 289 (2001) (deciding whether changes in immigration law applied to individual convicted before effective dates of amendments); *Martin v. Hadix*, 527 U.S. 343 (1999) (deciding whether attorney's fee provision of the Prison Litigation Reform Act applied to legal services provided prior to Act's effective date); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (considering retroactive application of amendments to the False Claims Act); *United States v. Larionoff*, 431 U.S. 864 (1977) (deciding validity of a Navy regulation that retroactively changed the standards for providing re-enlistment bonuses); *see also Reich v. Collins*, 513 U.S. 106 (1994) (deciding the proper remedy for those denied tax refunds under an unconstitutional statute).

The petition in this case is no less worthy of this Court's review. Indeed, as petitioner explains, the court of appeals' decision here implicates not only the constitutionality of this particular legislation and the immediate interests of a wide range of industries, but also broader questions about the proper First

Amendment standards for evaluating governmental viewpoint discrimination with respect to corporate speakers. *See* Pet. 27-31. The repeal of the Byrd Amendment does nothing to correct the basic constitutional errors in the decision below, which will govern future decisions by the Federal Circuit in similar circumstances and risk sowing doctrinal confusion elsewhere as other courts look to this decision for guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Federal Circuit

BRIEF OF FURNITURE BRANDS INTERNATIONAL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Furniture Brands International, Inc. ("FBN") is one of America's largest residential furniture companies. FBN owns many of the best-known brand names in the furniture industry, including Broyhill, Lane, Thomasville, Drexel Heritage, Henredon, and Maitland-Smith. At the time at issue here, FBN operated over 40 manufacturing facilities and employed nearly 20,000 workers across the United States.[1]

The Federal Circuit's decision has grave financial consequences beyond the parties in the case. FBN alone would recover nearly $25 million that has been set aside for FBN by U.S. Customs and Border Protection ("Customs"), but for the federal statute wrongly upheld by the Federal Circuit. *See* Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"), Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c). In 2003 and 2004, FBN participated in an investigation by the International Trade Commission ("ITC") into whether imports of Chinese wooden bedroom furniture were being dumped and injuring U.S. domestic producers. As a result of the ITC's investigation and its own findings of dumping, the Department of Commerce ("Commerce") imposed

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than FBN and its counsel, made a monetary contribution to fund the preparation or submission of this brief. Counsel of record for both parties received timely notice of FBN's intent to file this brief and have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

antidumping duties on Chinese furniture importers and collected tens of millions of dollars payable to domestic producers such as FBN. But because FBN did not express "support" for the imposition of duties in its written submission to the ITC, FBN is ineligible to receive the nearly $25 million of duties that has been set aside for FBN and otherwise would be paid to FBN. *See id.* § 1675c(b)(1)(A); *id.* § 1675c(d) (authorizing distribution of collected antidumping duties only to those "affected domestic producers" who either petitioned for or "support[ed]" a petition for antidumping duties).

In this brief, FBN explains why it did not support the imposition of duties on Chinese bedroom furniture. Those reasons involved classic political speech before a government agency. Moreover, even if viewed as "commercial" speech, the penalty that has been attached to that speech bears no relation to any governmental interest. FBN substantially assisted the ITC's investigation, and, as a qualifying domestic producer, FBN is directly harmed by the dumping found to exist. FBN submits that an understanding of its case will benefit the Court as it considers the important issues presented by the petition.

INTRODUCTION

If left undisturbed, the Federal Circuit's decision will preserve intact a statutory provision that penalizes speech based on its viewpoint. And the penalty is severe: the provision will cost firms that did not "support" petitions to lose hundreds of millions of dollars in distributions, as well as to

suffer in the marketplace by having to compete with firms who supported petitions and thereby received massive subsidies. This Court should grant the petition to rectify the constitutional and economic ramifications of the Federal Circuit's decision.

The Federal Circuit's error flowed from its fabrication of a statutory purpose for the Byrd Amendment divorced from the realities of antidumping investigations. According to the court, the fact that the Byrd Amendment conditions payment of distributions upon "support" for an antidumping petition is not an impermissible viewpoint-based restriction on speech because the Amendment furthers the purpose of "reward[ing] injured parties who assisted government enforcement of the antidumping laws." Pet. App. 33a. The court reasoned that because rewarding such speech amounts to "commercially contracting with [parties] to assist in the performance of a government function," *id.* at 40a, the Byrd Amendment constitutes a permissible regulation of "commercial speech," *id.* at 39a.

There are myriad flaws with this analysis, but among the most egregious is that the Federal Circuit equated a party's "support" for an antidumping petition to its degree of helpfulness to the government in enforcing antidumping laws. In so doing, the court below ignored an antidumping investigation's core purpose: to determine whether antidumping duties are necessary based on an impartial review of a carefully compiled record. Contrary to the Federal Circuit's supposition, the government's interest in enforcing antidumping laws

lies not in achieving a *particular* outcome – the imposition of antidumping duties – but rather in ensuring the existence of a fair enforcement process designed to reach the *correct* outcome. The Byrd Amendment does not further this interest; indeed, it undermines it.

When viewed through the lens of FBN's experience, this central flaw in the Federal Circuit's holding becomes clearly visible. In FBN's case, its views of its business and the state of the American furniture industry led it to oppose the petition for imposition of antidumping duties on Chinese bedroom furniture. But the fact that FBN opposed the petition does not negate the fact that FBN assisted the ITC in its investigation to the same extent as those domestic producers that supported the petition. If Congress intended to "reward" participants for providing assistance to the ITC, FBN richly deserved such a reward. Because the Byrd Amendment prohibits that outcome, it is apparent that the amendment was not intended to "reward" parties for assisting the ITC.

FBN's experience also illuminates the flaw in the reading of the Byrd Amendment urged by the government, which argued that the amendment was intended to identify and compensate those parties most injured by dumping. Pet. App. 30a. The ITC ultimately determined that exporters of Chinese bedroom furniture had injured the domestic furniture injury as a whole by dumping goods. As a member of the affected domestic industry – indeed, as one of America's largest residential furniture makers – FBN was among those parties directly

injured by this Chinese dumping. In fact, Customs determined that, but for the support requirement, FBN would be owed nearly $25 million in distributions from the duties collected on Chinese bedroom furniture.[2] Because the Byrd Amendment prohibits payment of the amount owed FBN, it is evident that Congress did not intend the amendment to direct compensation to parties most injured by dumping.

Stripped of these purported justifications, the true nature of the support requirement is laid bare: it is an arbitrary penalty on speech based upon its viewpoint. The Byrd Amendment *on its face* conditions payments upon a private party's naked expression of "support" for the imposition of antidumping duties. But as shown below, FBN's stated reasons for opposing the petition involved core political speech on matters of public policy. The Federal Circuit gravely erred when it classified such speech as sufficiently "like" commercial speech to warrant the penalties on it that the Byrd Amendment places. Moreover, even if a court could treat such statements as commercial speech, the amendment fails to pass the intermediate scrutiny applicable to laws curtailing commercial speech.

BACKGROUND

A. The Statutory Scheme.

In order to fully understand these cases, a brief statutory overview is useful. The "dumping" of goods

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[2] FBN filed suit against Customs and the ITC to recover these distributions, but proceedings in its suit have been stayed pending resolution of the instant *SKF* case.

occurs when an exporter sells goods in the United States at less than fair value. 19 U.S.C. § 1677(34). Customs will collect antidumping duties if (1) Commerce determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and (2) the ITC determines that a domestic industry will be harmed "by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation." 19 U.S.C. § 1673.

The process of obtaining an antidumping order usually begins when a party files a petition with Commerce and the ITC on behalf of a domestic industry alleging that the industry has been harmed by dumped goods. 19 U.S.C. § 1673a. In response, Commerce initiates an antidumping duty investigation. *Id.* Within 45 days of that date, the ITC must issue a preliminary determination as to whether a "reasonable indication" exists that an industry in the United States is materially injured or threatened with injury by reason of imports of the subject merchandise. *Id.* § 1673b(a). The ITC bases its preliminary determination on "questionnaire" responses from foreign producers, importers and domestic producers, and upon public conferences and post-conference briefs. *Id.*; 19 C.F.R. § 207.18; *see American Lamb Co. v. United States*, 785 F.2d 994, 998 (Fed. Cir. 1986).

If the ITC decides a reasonable indication of injury exists, Commerce then makes a preliminary determination whether a "reasonable basis" exists to "believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value."

Id. § 1673b(b). Commerce also issues a preliminary determination of the scope of the investigation. Within 75 days of that date, Commerce makes a final determination whether merchandise "is being, or is likely to be, sold in the United States at less than its fair value." *Id.* § 1673d(a)(1).

If Commerce makes an affirmative finding, the ITC makes a final determination whether a domestic industry is materially threatened or injured by the importation of that merchandise. *Id.* § 1673d(b). The ITC is required to consider several factors in making this decision, including actual and potential declines or negative effects in the output, sales, market share, profits, productivity, return on investments, utilization of capacity, cash flow, employment, wages, growth, ability to raise capital, and investment of the domestic industry. *Id.* § 1677(7). Its final determination "is based on technical and economic testimony given at a trial-like hearing." *American Lamb Co.*, 785 F.2d at 998-99.

Commerce can issue an antidumping order only if both Commerce and the ITC independently make affirmative final determinations. 19 U.S.C. §§ 1673d(c)(3), 1673e(a); *Ad Hoc Shrimp Trade Action Committee v. United States*, 515 F.3d 1372, 1375-76 (Fed. Cir. 2008). In the order, Commerce specifies which goods are subject to duties and their estimated duty rate. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089-90 (Fed. Cir. 2002). Commerce determines those duties by calculating the "dumping margin" for the subject merchandise, i.e., the total amount by which the price charged for

the subject merchandise in the home market exceeds the price charged in the United States. 19 U.S.C. § 1677(35)(A). Thus, the amount of duties can be specific to each foreign producer. Commerce then directs Customs to collect those duties on incoming goods. Commerce and the ITC periodically review whether dumping has occurred, the amount of the duty for each foreign producer, and the question of material injury. 19 U.S.C. §§ 1675 *et seq.*; *Belgium v. United States*, 551 F.3d 1339, 1341-42 (Fed. Cir. 2009).

Until 2000, antidumping duties collected by Customs were deposited with the Treasury for general expenditures. *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003). The Byrd Amendment transformed that regime by directing Customs to distribute collected antidumping duties to "affected domestic producers" that petitioned for relief or that "support[ed]" the petition. *See id.* (quotation marks omitted); 19 U.S.C. § 1675c(b)(1) (2001). Distributions are made on a pro rata basis to domestic producers based on the amount of "qualifying expenditures" – including expenditures on domestic manufacturing facilities, equipment, research and development, training, and technology – that the producer certifies it has incurred since imposition of the antidumping duties. *Id.* § 1675c(d)(3) (2001); § 1675c(b)(4) (2001); 19 C.F.R. § 159.61.

Due to litigation over the constitutionality of the Byrd Amendment, since December 2006 Customs has segregated but withheld distributions payable to domestic producers like FBN that submitted

"qualifying expenditures" but are ineligible for distributions solely due to the "support" requirement. Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814, 25,815 (May 29, 2009). If the Byrd Amendment is upheld, Customs will dispose of these funds to eligible domestic producers. *See id.* ("CBP will determine the proper recipients of these funds once certain legal issues are resolved.").

B. FBN And The ITC's Chinese Bedroom Furniture Proceeding.

In 2003, the ITC instituted an antidumping investigation of wooden bedroom furniture imported from China. *See* Wooden Bedroom Furniture from China, 68 Fed. Reg. 63,816, 63,817 (Nov. 10. 2003). Among the parties from which the ITC sought information in connection with this investigation was FBN. As one of the largest residential furniture manufacturers in America, FBN's assessment of the competitive market for bedroom furniture and the potential need to impose duties on imports allegedly being dumped from China obviously was significant.

In the questionnaire FBN was required to submit to the ITC, FBN was asked to check a box indicating whether it supported the imposition of duties, opposed, or took no position. FBN checked the box indicating that it was opposed. In the company's detailed questionnaire response (which included extensive financial information) and in subsequent testimony and briefing, FBN explained the basis for its position. Obviously, FBN's assessment of the industry was based only on its own view of market

conditions, without access to the confidential information of its domestic and foreign competitors and other market participants. But FBN opposed the imposition of duties for several reasons.

Fundamentally, FBN opposed the petition because it believed low-cost foreign competition was inevitable, FBN had made substantial investments to meet that competition, and FBN did not believe the domestic industry as a whole should hide behind the temporary and false protection of trade barriers. FBN explained that it was competing in the domestic market with furniture made not just in China but also in Indonesia, the Philippines, Malaysia, Vietnam, South Africa, and elsewhere. FBN advised that its understanding of the market was that production could be transferred relatively easily among foreign countries, so that if duties were imposed on Chinese furniture, production likely would shift to other Asian countries. As a result, FBN opined, American furniture manufacturers had no choice but to compete in an international marketplace, where many countries had lower labor and other costs than typically exist in America. As FBN framed the issue, "[t]he question put by this petition is whether we will rise to this challenge and learn how to compete globally, or whether we will retreat behind tariff-based walls."

FBN explained that it had made substantial investments so that it could succeed in this international marketplace even without temporary and ultimately ineffective trade barriers. One, it had cut costs at its domestic manufacturing facilities. For example, all of Broyhill's "Attic Heirlooms"

furniture collection was manufactured in North Carolina. As FBN explained to the ITC, "[b]y careful attention to its cost structure, Broyhill has been able to offer that product line at prices that are competitive with similar products brought in from offshore." Two, FBN had expanded its business through the careful use of products manufactured overseas and imported into America. This, too, required investment. As FBN advised the ITC, it had made substantial outlays to procure scheduling, shipping, and quality control services in the Far East, as well as access to laboratory facilities for product testing in China and the Philippines.

Thus, FBN reported that 80% of its sales of wooden bedroom furniture at that time were of furniture that had been made at one of FBN's 40 manufacturing facilities in America, while 20% of its sales were of furniture that FBN had imported from overseas. Of the 20% of sales of furniture made overseas and then sold in America, 14% of sales were of bedroom furniture imported from China, and the rest from other countries. But even though the overwhelming majority of FBN's bedroom furniture was produced domestically, and under the recently-enacted Byrd Amendment FBN could recover a share of any duties imposed on Chinese imports if it supported the petition to impose such duties, FBN's overall assessment was that trade barriers and duties were not the appropriate answer. Instead, FBN advocated in its responses to the ITC that domestic producers should be rewarded for making appropriate investments, as FBN had done, to meet the reality of foreign competition.

FBN, however, was only one participant in the ITC's proceedings. Ultimately, based upon all of the responses it received, the ITC decided that the domestic bedroom furniture industry – of which FBN remained one of the largest members – was being harmed by the dumping of Chinese bedroom furniture. *See* Wooden Bedroom Furniture From China, 69 Fed. Reg. 77,779 (Dec. 28, 2004).

The ITC based its decision on several grounds. It found that two-thirds of imports of Chinese bedroom furniture were by importers selling merchandise in direct competition with the domestic industry, rather than by domestic producers such as FBN that had adopted a "blended sourcing" strategy. *See* USITC, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058 (Final), Pub. 3743, at 24-26 (Dec. 2004). In addition, the ITC found that operating income margins had declined on the whole for domestic producers as a result of an influx of Chinese furniture. *Id.* Finally, relying on a wealth of proprietary and industry-wide data unavailable to FBN, Commerce (in its separate proceeding) determined that a substantial amount of this Chinese furniture was being dumped in the United States – i.e., sold at less than fair value; in turn, the ITC concluded that the domestic furniture industry had lost significant market share to these dumped imports. *Id.* at I-3 & 26.[3]

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[3] Ultimately, however, FBN's own Chinese suppliers were *not* assigned significant antidumping duties by Commerce, because they were not found to be selling goods at significantly less than fair value.

As FBN's story proves, a party's reasons for opposing, rather than supporting, imposition of duties have nothing to do with whether it "assisted" the ITC in its investigation or whether dumping "harmed" it. To the extent that dumped Chinese imports were injuring the domestic furniture industry, as the ITC ultimately found, and FBN incurred domestic "qualifying expenditures," FBN was impacted by Chinese dumping just as much as other domestic manufacturers. Once the government determined that duties were appropriate and ought to be collected and distributed to domestic producers, there is absolutely no reason why FBN should not recover its share of those duties, given that it forms a substantial part of the domestic industry the ITC determined to be injured by dumped imports. The Byrd Amendment does not allocate duties based upon a company's potential ability to withstand foreign competition, or upon its foresight (or lack of foresight) in responding to foreign competition, but rather upon its *advocacy position* as expressed in a public proceeding before the ITC. That statutory scheme is blatantly unconstitutional.

REASONS FOR GRANTING THE PETITION

The issue presented by the petition is substantial and affects hundreds of millions of dollars in numerous pending cases. As FBN recounts herein, its own experience illustrates that a party's "support" for antidumping duties bears no relation to its degree of usefulness to the government, and that the government's claim that the purpose of the Byrd Amendment is to compensate those companies most injured by dumping is untenable. FBN's example

furthermore shows that the amendment penalizes core political speech. The Court should grant the petition for certiorari.

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE OF THE IMPORTANCE OF THE ISSUE PRESENTED, THE NUMBER OF CASES AFFECTED, AND THE CLEAR FLAWS IN THE FEDERAL CIRCUIT'S STATUTORY ANALYSIS.

The Federal Circuit concluded that the Byrd Amendment's purpose is to "reward" participants in antidumping investigations for their assistance to the government. But this reading ignores the evident congressional policy behind antidumping investigations and the contributions made by parties such as FBN.

A. FBN Provided Extensive Assistance During The ITC's Investigation Of Wooden Bedroom Furniture From China.

FBN provided substantial support to the ITC in connection with the Commission's investigation of alleged Chinese dumping of wooden bedroom furniture in America. Although at that time FBN primarily manufactured its furniture domestically, it also imported roughly one-fifth of its furniture from abroad. FBN thus had a wealth of real-world experience regarding both the imported and domestic furniture markets to contribute to the ITC's investigation.

FBN assisted the ITC's investigation with its submission of two lengthy responses to the ITC's questionnaires, one in its capacity as a domestic producer and the other in its capacity as an importer.

The responses contained product descriptions and comparisons, FBN's analyses of the state of the furniture business in America, and a wealth of proprietary financial data covering FBN's production capacity, inventories, shipments, and costs of production. Preparing these responses, which together totaled more than 100 pages, cost FBN over $33,000 and consumed nearly 700 hours of work.

FBN's assistance did not end there. FBN sent a senior executive, Lynn Chipperfield, to testify at an ITC conference regarding the impact of Chinese bedroom furniture imports on domestic furniture makers. FBN later submitted written testimony from Mr. Chipperfield explaining FBN's assessment of the wisdom of imposing antidumping duties. After the conference, FBN also provided the ITC with briefing explaining its view that price resistance among U.S. consumers, not dumping by Chinese importers, was responsible for weakness in the domestic furniture market. FBN later submitted comments explaining how the ITC should modify its questionnaires to elicit complete information from domestic producers before reaching a final determination on whether to impose duties.

Throughout, FBN provided complete and detailed information and advice to the ITC that assisted the ITC's assessment of the domestic furniture market. Indeed, FBN did more than most "supporters" of petitions do to help the ITC and Commerce pursue their antidumping investigation. Even the company that sought antidumping duties on imports of bearings in the case before the Court did not make a significantly greater contribution to the ITC's

investigative process than FBN did: like Torrington, FBN submitted "scores of pages of sales data. . . , product descriptions and comparisons, detailed analysis of the [relevant] industry, and extensive proprietary financial data," and "appeared through counsel and submitted briefs to support its arguments" at ITC proceedings. Pet. App. at 10a, 45a. FBN's efforts far surpassed the contributions made by most other participants in ITC proceedings, whether supporters or not.

B. The Federal Circuit Was Wrong To Equate "Assistance" With "Support."

Although FBN's views ultimately did not prevail, its participation in the ITC investigation promoted one of Congress's central statutory purposes: to ensure that antidumping duties are imposed pursuant to a fair, evenhanded process.

"[A] multi-step process involving actions by both Commerce and the ITC must be completed before an antidumping order can issue." *Ad Hoc Shrimp Trade*, 515 F.3d at 1375-76. Each step of this process is larded with safeguards to ensure that an antidumping order issues against exporters only where the evidence truly warrants such action.

For Commerce to issue an antidumping order, two separate agencies – both Commerce and the ITC – must concur that such action is warranted. 19 U.S.C. §§ 1673d(c)(2), 1673e(a). Commerce must determine that dumping occurred, and the ITC separately must determine that dumped goods caused or threatened material injury to domestic producers. *Id.*; *United States v. Eurodif, S.A.*, 129

S. Ct. 878, 883-84 (2009). "This bifurcation reduces the risk that an improper bias will deprive importers of their due process rights." *NEC Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998).

Each agency also is separately required to ensure fair procedures. Commerce's investigation proceeds in two phases: a preliminary determination and a final determination. The preliminary determination "triggers an opportunity for the affected parties to participate actively in the process." *Id.* Before reaching a final determination, Commerce must hold a hearing at the request of any interested party, and is "required by statute to address the arguments made at the hearing regarding the proper methodology for the dumping calculation." *Id.* at 1374; 19 U.S.C. § 1677c; 19 U.S.C. § 1677f(i)(3)(A). Throughout, Commerce must rely solely on information "presented to or obtained by Commerce during the course of the proceeding. Commerce may not base its decision on information outside the record." *NEC*, 151 F.3d at 1373; 19 U.S.C. § 1516a(b)(2).

Congress likewise bound the ITC to maintain a fair process. The ITC has an "affirmative obligation and duty" to conduct a "thorough investigation" in making its determinations. *Budd Co. Ry. Division v. United States*, 507 F. Supp. 997, 1001 (Ct. Int'l Trade 1980). The ITC must act as an impartial decision-maker. *See NEC*, 151 F.3d at 1371 (holding that parties before the ITC are entitled to procedural due process and that the "right to an impartial decision maker is unquestionably an aspect of procedural due process"). The ITC must base its

ultimate determination whether to impose duties on the record, and the record must include questionnaires submitted by those supposedly affected by the alleged dumping. *See* 19 C.F.R. § 207.2(f).

As an additional safeguard, Congress provided that parties may seek judicial review of an antidumping investigation in the Court of International Trade. 19 U.S.C. § 1516a(a). Decisions of that court may be appealed to the Federal Circuit and to this Court.

The cross-cutting checks laced through this statutory scheme prove that Congress's intent is not to railroad a finding that antidumping duties should be imposed. *See NEC*, 151 F.3d at 1370-71 ("there inheres in the statutory scheme created by Congress an implicit expectation that governmental decision makers will act honestly and fairly in the performance of their duties. . . . NEC is due a fair and honest process."). To the contrary, an antidumping investigation must be conducted before "fair and honest" decision-makers who may only determine whether to impose duties based on an impartial assessment of the record evidence before them. Congress's intent is manifestly to ensure that antidumping investigations reach the correct outcome, not a predetermined one.

The Federal Circuit imputed a purpose to the Byrd Amendment that destroys the studied neutrality of this statutory scheme. In its view, only "supporters" of petitions further the government's interest in enforcing antidumping laws. To analogize

to the criminal law, the Federal Circuit took the stance that because the government has an interest in enforcing its criminal laws, only prosecutors aid in the proper administration of those laws. But the fact that the government has an interest in enforcing its criminal laws does not mean that its goal is to achieve "as much imprisonment as possible." Rather, the government's "obligation to govern impartially is as compelling as its obligation to govern at all," and its "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Judges, juries, defense attorneys, and prosecutors all have important roles to play in that process of attaining justice – regardless whether in a particular case they believe that conviction and imprisonment are appropriate.

The Federal Circuit's contrary view of antidumping investigations wrongly equates *maximal* enforcement with *fair* enforcement, and would generate perverse results. By making only supporters of petitions entitled to receive distributions, the Byrd Amendment fatally biases the record before the ITC towards support of the petition – a result inimical to Congress's abundantly apparent interest in securing the even-handed enforcement of the antidumping laws. Because the Byrd Amendment undermines, rather than furthers, the purpose of antidumping investigations, the Federal Circuit erred by treating it as "advanc[ing] the government's interest in enforcing its trade laws." Pet. App. 45a.

II. The Government's Theory Of The Byrd Amendment Is Wrong, And Does Not Offer A Basis For Denying Certiorari.

The government presented a different and equally wrong theory of the Amendment's purpose to the Federal Circuit. According to the government, the Byrd Amendment's purpose was to "identify those producers suffering the greatest injury," Pet. App. 30a, and to compensate them. The Federal Circuit did not endorse the government's theory, and nor should this Court. As FBN's experience proves, injury from dumping bears no relation to whether a party supported the imposition of antidumping duties before the ITC. Because the government's justification for the Byrd Amendment fails to provide a colorable basis to support the Federal Circuit's ruling, this "injury" theory presents no obstacle to a grant of certiorari.

The Byrd Amendment specifies that assessed duties received by Customs must be distributed on an annual basis to affected domestic producers that have incurred "qualifying expenditures" subsequent to the issuance of an antidumping order. *See* 19 U.S.C. § 1675c; 19 C.F.R. §§ 159.61(a), 159.64. "Qualifying expenditures" means funds expended on domestic manufacturing facilities, equipment, research and development, training, technology, or health care benefits, as long as those expenditures relate to production of the product that was the subject of the antidumping order. 19 U.S.C. § 1675c(b)(4).

By tying reimbursement to expenditures, Congress intended to promote the purposes of the trade laws to provide a remedy for injurious dumping. As Congress stated in the findings justifying the Byrd Amendment, sustained dumping makes domestic producers "reluctant to reinvest or rehire," and may cause them to be "unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses . . . may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable." *See* Byrd Amendment, § 1002. Returning collected antidumping duties on a pro rata basis to domestic producers compensates those producers in proportion to their willingness to incur investments in capital, labor, and personnel. The Byrd Amendment thereby remedies some of the harm caused to those producers by dumping.

There is no dispute that FBN incurred hundreds of millions of dollars of such qualifying expenditures, and, absent the "support" requirement of the Byrd Amendment, it would be entitled to recover a substantial sum of collected duties. FBN documented and certified these expenditures to Customs. *See* 19 C.F.R. § 159.63(a)-(b) (requiring producers to enumerate and certify amount of expenditures claimed). After review and verification of FBN's submissions, Customs calculated that, but for the Byrd Amendment, FBN should receive $24,478,416.92 in distributions for the 2006-2008 fiscal years.

The fact that FBN did not "support" the antidumping petition in 2003 does not diminish

these qualifying expenditures by a penny. Conversely, if FBN *had* supported the petition in 2003, its qualifying expenditures would not have been a penny more. In short, FBN's support *vel non* of the antidumping petition bears no relation to the injury it has suffered through illicit dumping. Denying FBN compensation for these expenditures would subvert Congress's stated intent in enacting the Byrd Amendment – to finance out of collected antidumping duties the investments made by domestic producers in capital, labor, and personnel. No support exists for the government's theory that the Byrd Amendment somehow identifies and compensates only those producers that sustained injury from dumping. *See* Pet. App. 30a.

III. The Byrd Amendment Penalizes Protected Speech And Cannot Withstand First Amendment Scrutiny.

The Federal Circuit erred when it concluded that domestic producers involved in antidumping proceedings were effectively engaged in "commercial speech" when they expressed their support for or opposition to an antidumping petition, and when it concluded that the consequences of the Byrd Amendment were a permissible restriction on such commercial speech. Pet. App. 39a-40a. These holdings contravene this Court's established First Amendment jurisprudence on multiple grounds.

First, even if the Byrd Amendment were treated as a regulation of commercial speech, it still would fail to withstand the scrutiny applicable to such regulation. Commercial speech, which is "expression

related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980), only may be regulated if the government's interest is "substantial," the regulation "directly advances" the governmental interest asserted, and the regulation is "not more extensive than is necessary" to serve the interest asserted. *Id.* at 566. Even assuming that preventing dumping is a "substantial" government interest, the Byrd Amendment fails to directly advance that interest in a properly tailored fashion. Rather than reward all parties who assist antidumping investigations, it rewards only those parties who express "support" for a petition. But as noted above, a party such as FBN assists the government in enforcing the antidumping laws, regardless whether it supports or opposes the imposition of duties, through the detailed information it provides during the course of the investigation. The Byrd Amendment irrationally disregards these efforts and thus fails to meet even the *Central Hudson* test for legitimate restrictions on commercial speech.

Second, a producer's opposition to or support for an antidumping petition is *not* commercial speech (or "similar to" commercial speech, Pet. App. 40a), but rather is core political expression in a public proceeding before a government agency. FBN explained that imposing antidumping duties on Chinese bedroom furniture would not bring jobs to America or keep them here. Rather, new tariffs on Chinese imports merely would increase costs to

American consumers and shift imports to other countries such as Indonesia, Malaysia, and Vietnam. FBN argued that those companies that had taken steps to compete in the global marketplace should benefit from those investments without the artificial constraints on competition provided by trade barriers. FBN concluded that "[b]laming the Chinese for the inevitable consolidation of our industry is merely a distraction from our real challenge of remaining competitive," and that retreating behind "tariff-based walls" would not help the American furniture industry to learn to cope with global competition.

Such advocacy lies at the heart of the realm of political speech protected by the First Amendment from government censorship or penalty. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *See Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). The fact that FBN's statements concerned economic policy does not transform them into commercial speech or lessen the protection to which they are entitled. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political *and economic truth*. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." *Id.* at 95 (emphasis added). Indeed, FBN believed that the issues before the ITC were of sufficient public import

that it issued a press release detailing its reasons for opposing the petition.

FBN's example makes clear that the speech punished by the Byrd Amendment cannot sensibly be categorized as "commercial speech" or even as "similar to" commercial speech, as the Federal Circuit insisted. The amendment *on its face* penalizes parties based on the viewpoint they express regarding political and economic policy. Such a law cannot stand. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Federal Election Commission*, __ S. Ct. __, No. 08-205, 2010 WL 183856, at 19 (2010); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

U.S. CUSTOMS AND BORDER PROTECTION,
U.S. INTERNATIONAL TRADE COMMISSION,
TIMKEN U.S. CORPORATION, UNITED STATES,
JAYSON P. AHERN, ACTING COMMISSIONER,
U.S. CUSTOMS AND BORDER PROTECTION,
AND SHARA L. ARANOFF, CHAIRMAN,
U.S. INTERNATIONAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF GIORGIO FOODS, INC. AND PS CHEZ SIDNEY, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF GIORGIO FOODS, INC. AND PS CHEZ SIDNEY, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Giorgio Foods, Inc. ("Giorgio") and PS Chez Sidney, LLC ("Chez Sidney") respectfully submit this brief as *amici curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

Giorgio and Chez Sidney, both small businesses, are domestic producers of products covered by a series of antidumping duty orders. Neither is affiliated with a foreign producer of the merchandise covered by those orders. Both actively assisted the petitioner and/or government agencies in the antidumping investigations and in obtaining the antidumping duty orders, and the government treated both companies as part of the domestic industries that were injured by dumped imports. Nonetheless, under the Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c) ("CDSOA"), both companies were denied distributions of antidumping duties collected under those orders solely because, by compulsion of law, they expressed the

1. Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their shareholders, members, or counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

viewpoint that they took no position regarding, or opposed, the petitions that preceded the antidumping orders, in response to U.S. International Trade Commission ("ITC") questionnaires issued years before the CDSOA was enacted. Giorgio and Chez Sidney were the first domestic producers to challenge the constitutionality of the CDSOA petition support eligibility condition, and both have cases pending in the lower courts.

BACKGROUND

1. Giorgio

Giorgio, headquartered in Temple, Pennsylvania, is the single largest U.S. domestic producer of preserved mushrooms. In 1998, the *ad hoc* Coalition for Fair Preserved Mushroom Trade, comprising seven domestic producers, filed petitions for antidumping duties against imports of preserved mushrooms from four countries.[2] The members of the coalition represented a sufficient portion of the domestic mushroom industry to meet the standing requirements for bringing antidumping petitions. Although Giorgio elected not to join that coalition formally or publicly, it significantly assisted the coalition in its efforts to file and prosecute the petitions, and thereby supported each of the four mushroom antidumping investigations. Giorgio contributed more

2. The process by which a petitioner commences a petition for the imposition of antidumping duties and the procedures by which the Department of Commerce and the ITC evaluate the petition are fully explained in the Petition for Certiorari. Pet. 4–6; *see also United States v. Eurodif, S.A.*, 129 S. Ct. 878, 883–84 (2009) (describing generally the antidumping petition and investigation process).

than $1 million to the legal fees incurred by the coalition—more than any member of the coalition. Giorgio provided confidential business data that enabled the coalition to prepare the petition and to prosecute the case. Giorgio hosted ITC investigators for a field visit to a domestic producer. And Giorgio provided data in its responses to ITC questionnaires that enabled the ITC to conclude that the domestic industry as a whole—which it defined so as to include Giorgio—was injured by reason of dumped imports from all four countries. U.S. INT'L TRADE COMM'N, CERTAIN PRESERVED MUSHROOMS FROM CHINA, INDIA, AND INDONESIA, Inv. No. 731-TA-777-779 (Final), USITC Pub. No. 3159, at 5, 21 (Feb. 1999) *available at* http://www.usitc.gov/publications/701_731/pub3159.pdf; U.S. INT'L TRADE COMM'N, CERTAIN PRESERVED MUSHROOMS FROM CHILE, Inv. No. 731-TA-776 (Final), USITC Pub. No. 3144, at 8, 24 (Nov. 1998) *available at* http://www.usitc.gov/publications/701_731/pub3144.pdf.

In response to the ITC's investigative questionnaires, however, Giorgio indicated that it took no position with respect to the petitions concerning Chile, China, and Indonesia, and that it opposed the petition concerning India. Giorgio declined to check the "support" box for business reasons unrelated to the injurious impact it believed imports were having on its business. For example, a Giorgio affiliate imported preserved mushrooms from Indonesia to Europe, and thus Giorgio did not want its support of the petitioner to be public so as potentially to jeopardize that business relationship. Giorgio was not affiliated with any of the foreign producers covered by the antidumping orders.

The Department of Commerce ("Commerce") entered antidumping duty orders against preserved mushrooms from Chile on December 2, 1998 and from China, India, and Indonesia on February 19, 1999. After the CDSOA was enacted in 2000, Giorgio informed the ITC of the substantial assistance it provided to the petitioner in support of the preserved mushroom petitions. The ITC nonetheless determined that Giorgio was ineligible for CDSOA distributions exclusively on speech-based grounds, because Giorgio had not checked the "support" box in its responses to the ITC's final phase questionnaires in the injury investigations. To date, for Fiscal Years 2001-2009, Giorgio has been denied over $8 million in CDSOA distributions, solely because it did not publicly express its support of the antidumping petitions. Its domestic competitors all have received distributions.

On May 23, 2003, Giorgio filed suit in the Court of International Trade ("CIT") challenging the constitutionality of the CDSOA's petition support requirement. *See Giorgio Foods, Inc. v. United States*, Court No. 03-00286 (Ct. Int'l Trade). The CIT stayed Giorgio's case pending resolution of *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, Court No. 02-00635 (Ct. Int'l Trade), discussed below.

2. Chez Sidney

Chez Sidney was a domestic producer of crawfish, with a processing facility in Catahoula, St. Martin Parish, Louisiana. It was not affiliated with any foreign crawfish producer. It suffered economic harm from dumped imports of crawfish from China. In 1996, with the support of the Louisiana Department of Agriculture, an *ad hoc* Crawfish Processors Alliance filed an antidumping petition against

crawfish from China. No domestic producer was a petitioner. In its October 7, 1996 response to the ITC's preliminary phase questionnaire in that proceeding, Chez Sidney checked the box indicating its "support" for the antidumping petition. In its May 5, 1997 questionnaire response during the final phase of the ITC's injury investigation, Chez Sidney checked the box "take no position" on the petition, without explanation, and returned the questionnaire unsigned. The ITC determined the last-filed questionnaire response to be controlling for CDSOA eligibility purposes, and denied Chez Sidney's request to be added to the list of eligible domestic producers. Customs has determined that Chez Sidney would have received over $1.1 million in CDSOA distributions but for the unconstitutional petition support requirement. For Fiscal Years 2002–2004, eligible domestic crawfish processors each received an average annual CDSOA distribution of more than $300,000.[3] These huge subsidies enabled Chez Sidney's competitors to underbid it both in purchasing crawfish and in selling processed meat, which resulted in lost business. The continued dumping of Chinese crawfish and the large CDSOA distributions that have been paid

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3. *See* U.S. CUSTOMS & BORDER PROTECTION, ANNUAL REPORT (FINAL) CDSOA FY 2002 DISBURSEMENTS, *available at* http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_02/; U.S. CUSTOMS & BORDER PROTECTION, CDSOA FY 2003 FINAL ANNUAL REPORT, *available at* http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_03/cdsoafy03_annual_report.xml; U.S. CUSTOMS & BORDER PROTECTION, FY 2004 ANNUAL DISBURSEMENT REPORT, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_04/fy2004_annual/annual_disbursement.ctt/annual_disbursement.pdf.

to Chez Sidney's domestic competitors since 2002 combined to drive Chez Sidney out of the crawfish business in 2004. In 2006, it was forced to file a chapter 11 reorganization proceeding with its parent company and sell its physical assets.

On October 2, 2002, Chez Sidney challenged the constitutionality of the CDSOA under the First and Fifth Amendments in the Court of International Trade, and the court granted Chez Sidney partial summary judgment on July 13, 2006. *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006). The court determined that the CDSOA differentially rewards or burdens speech on the basis of viewpoint and that it is therefore subject to strict scrutiny. *Id.* at 1355–56. The court found that, contrary to the government's arguments, questionnaire responses regarding whether a producer supports a petition are statements of opinion, not fact, and that a producer might oppose a petition for numerous reasons. *Id.* at 1357. The court specifically found that whether a producer indicates support for a petition is not a reliable proxy for whether that producer has been harmed by the alleged dumping. *Id.* The court also noted that, if the government's interest was in fact to allocate subsidies to the producers most harmed by dumping, other means were available for assessing injury. *Id.* Accordingly, the court held that the CDSOA could not pass strict scrutiny and held it unconstitutional under the First Amendment. *Id.* at 1359.

The United States appealed the *Chez Sidney* decision to the Federal Circuit; that appeal has been stayed pending the outcome of this case.

3. The Decisions Below

Petitioner SKF USA Inc. ("SKF") filed the present case in the CIT in 2005 and, in September 2006, the CIT issued its decision holding that the CDSOA violates the equal protection guarantee of the Fifth Amendment by discriminating among domestic producers without a rational basis. Pet. App. 145a–146a.

A divided panel of the Federal Circuit reversed. The court summarily rejected SKF's arguments that the CDSOA violated the Fifth Amendment, Pet. App. 51a–52a, and instead focused in detail on SKF's First Amendment challenge. The court of appeals rejected the government's claim that the CDSOA's support-eligibility requirement served as a proxy to identify the domestic producers that were injured by dumping; the court instead concluded that Congress enacted the CDSOA "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." *Id.* at. 33a. The majority also held that the CDSOA's support-eligibility requirement was akin to the regulation of commercial speech, because Congress, in effect, had contracted for assistance in its enforcement efforts. *Id.* at 40a. Finally, the court held that the Act satisfied the requirements applicable to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). Pet. App. 41a–45a.

Judge Linn dissented. Pet. App. 53a–100a. He explained that the CDSOA on its face discriminated among producers based on the content and viewpoint

of their answers to ITC's questionnaire by making eligibility for CDSOA distributions dependent solely on the producer's expression of support for the antidumping petition. *Id.* at 89a. Because the CDSOA discriminated among speakers on the basis of their viewpoints, Judge Linn concluded that the CDSOA was subject to strict scrutiny, and that the Act failed that standard of review. *Id.* at 94a.

ARGUMENT

This Court's review is warranted because a divided panel of the Federal Circuit upheld the constitutionality of an Act that facially discriminates on the basis of a citizen's viewpoint concerning whether the government should undertake an enforcement action against foreign imports. That speech concerns a matter of obvious political concern, and yet the Federal Circuit reached the remarkable conclusion that the Act escaped strict scrutiny because of a hypothesized statutory purpose to reward support of government investigation efforts. A questionnaire that requires a citizen to express his view on whether the government should take prosecutorial action can never be the basis of government allocation of public benefits.

The reasoning of the majority is manifestly wrong, and casts aside decades of this Court's settled First Amendment jurisprudence. Moreover, despite the Act's prospective repeal, the Act continues to govern the ongoing entitlement of domestic producers to many millions of dollars over many years to come, and chills the speech of companies denied valuable benefits based on the viewpoint they expressed on a policy issue in response to a government questionnaire.

I. The CDSOA Facially Violates the First Amendment By Conditioning Eligibility for a Government Benefit Upon a Citizen's Speech

A. The CDSOA Eligibility Scheme Facially Discriminates on the Basis of a Producer's Expressed Viewpoint

The CDSOA on its face grants subsidies based on a domestic producer's expression of support for a specific governmental enforcement action—whether additional duties should be imposed on particular imports. That facially discriminatory treatment based exclusively on the content of speech is subject to strict scrutiny. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, No. 08-205, slip op. at 23–24 (S. Ct. Jan. 21, 2010);*United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Because the government cannot claim (and has not claimed) that the CDSOA survives strict scrutiny, the Act is unconstitutional.

The majority below acknowledged the obvious—that responses to ITC questionnaires are "protected First Amendment activity"—Pet. App. 38a—but nonetheless held that the Act's "language . . . is easily susceptible to a construction that rewards actions (litigation support)." *Id.* at 36a. But the Act unambiguously ties eligibility only to the expression of speech, *i.e.*, an expression of support for an antidumping petition. Giorgio took concrete *actions* to support the mushroom petitions, but is ineligible for CDSOA distributions solely

because of the *viewpoint* of its speech. If the government tied public benefits to a statement of support for the President, no one would suggest that the statute could be saved by construing it to merely "reward actions (political support)."

Nor is it relevant that that the Act does not "ban speech entirely," because producers are free to answer the questionnaire however they want and can express their views outside the context of the questionnaire. *Id.* at 28a. This Court's precedents do not distinguish between content-based *prohibitions* on speech and content-based *discrimination* against speech. *Simon & Schuster*, 502 U.S. at 115 (striking down a statute that did not prohibit speech because it "impose[d] a financial burden on speakers because of the content of their speech"); *accord Citizens United*, No. 08-205, slip op. at 23 ("Laws that burden political speech" are subject to strict scrutiny.). The CDSOA's support-based eligibility criterion not only discriminates based on the content of speech, it does so in the most pernicious way: based on the speaker's viewpoint. The Act subsidizes only those producers that voice support for the imposition of antidumping duties on particular imports, while denying subsidies to producers that decline to indicate support.

In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court struck down a California law that required veterans to affirm that they did not support the overthrow of the U.S. government before they could claim a tax exemption available to veterans. The Court explained that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize

them for such speech." *Id.* at 518. The Court similarly has observed that "[t]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 828–29 (citations omitted); *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."); *accord Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983); *Miami Herald Publ'g Co. v. Tornilo*, 418 U.S. 241, 256 (1974); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Those well-settled precedents doom the constitutionality of the Act.

As Judge Linn explained, Pet. App. 91a–92a, the CDSOA also violates the First Amendment because it discriminates based on viewpoint in a limited public forum—in this case the ITC proceeding—that the government itself establishes. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Having established the ITC proceeding as a forum in which views on trade petitions are to be expressed, both to the public and to the government, Congress may not impose viewpoint-based burdens absent a compelling governmental interest and a narrowly tailored restriction. *Rosenberger*, 515 U.S. at 829. By paying only those domestic producers who indicate in questionnaire

responses that they support the petition, the government distorts the impartial system it has created for adjudicating unfair trade disputes, impermissibly influencing the views domestic producers express on petitions and thereby distorting both the ITC's assessment of injury and the independent statutory requirement that petitions must enjoy support from a majority of the affected industry. *Citizens United*, No. 08-205, slip op. at 28 (ban on expenditures for political speech based on identity of speaker interfered with "open marketplace" of ideas); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 534 (2001) (rejecting congressional curbs placed on Legal Aid lawyers, which "distort the legal system by altering the attorneys' traditional role").

B. The Court of Appeals' Reasoning Is Unpersuasive

The majority offered several rationales to support the constitutionality of the CDSOA. First, after rejecting the arguments advanced by the government, the court reasoned that the Act was saved by a hypothetical benign purpose to reward producers that assisted the government's enforcement efforts. Pet. App. 33a. Second, the court held that the Act's support-eligibility requirement could be reviewed under commercial speech doctrine. *Id.* at 40a. Third, the court attempted to draw support from statutes that award a bounty to individuals who support the government's enforcement efforts. *Id.* at 41a–43a. Fourth, the court suggested, but did not decide, that the Act merely promoted a

government-funded message. *Id.* at 40a n.29. None of those reasons withstands scrutiny.[4]

1. The majority erred in holding the statute was constitutional because Congress might have intended in the CDSOA to reward producers that provide assistance to the government in conducting antidumping investigations. Pet. App. 32a–33a. Because the Act is facially content-based and viewpoint discriminatory, a benign purpose is beside the point. Plaintiffs challenging content-based regulations need not adduce "evidence of an improper censorial motive." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Viewpoint discrimination does not trigger the First Amendment "only when the legislature intends to suppress certain ideas . . . . [O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the Amendment.'" *Simon & Schuster*, 502 U.S. at 117 (citations omitted); *accord Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

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4. The court of appeals correctly rejected as "simply implausible" the government's argument that the support-eligibility requirement was a constitutionally legitimate "surrogate for injury" to identify the domestic producers that were harmed by dumping. Pet. App. 30a. Even were the Act's petition support requirement a "surrogate for injury," that fact would not save this facially discriminatory statute. Indeed, the government's "surrogate for injury" defense necessarily presumes that Congress could have achieved its asserted objective without viewpoint discrimination on whether particular government action was supported, *i.e.*, by simply asking producers on the questionnaire whether they were injured by dumped imports.

In any event, the Act's purpose is *not* to reward producers that assist the government's efforts in antidumping enforcement. A producer's mere statement of support on a questionnaire bears no necessary relationship to the producer's actual assistance to the government. A producer can check the box indicating support for the petition without providing *any* actual assistance to the government. Conversely, as in Giorgio's case, a producer can express no position on a questionnaire and yet provide an extraordinary level of assistance. Also, the Act's very structure negates the purpose the majority hypothesized. Distributions are paid relative to "qualifying expenditures," defined to include producer spending incurred only after an antidumping order is obtained. 19 U.S.C. § 1675c(d)(3). The Act hardly can reward conduct necessary to obtain an order when it pays benefits based on conduct occurring exclusively after the order is obtained.

Nor, as the CIT found in *Chez Sidney*, 442 F. Supp. 2d at 1357, can a producer's response regarding its support for a petition be used as a proxy for either the amount of assistance provided by the producer or the extent to which the producer was harmed by the dumping. Producers can oppose petitions, or take no position, for numerous reasons: because they fear retaliation in their export markets, because they believe in free trade, or because they believe a petition to lack merit, among others. Giorgio, for instance, declined to support the preserved mushroom petitions primarily out of concern for business relationships that were unrelated to the domestic market. Whatever a

producer's reason, the First Amendment allows the viewpoint to be expressed without penalty.[5]

2. The majority justified its application of this Court's commercial speech cases because it equated awarding CDSOA distributions based on an expression of support with "contracting with [parties] to assist in the performance of a government function." Pet. App. 40a. That analysis is as tortured and wrong as saying that tying benefits to a requirement that a citizen support the war in Afghanistan is like contracting with citizens to assist in the government's war efforts. The CDSOA is not a contract, and it is not based on assistance. It is a subsidy tied to political speech. There is simply nothing commercial about a statutory requirement that domestic producers express their opinion about a government enforcement effort, and there is likewise nothing commercial about tying a public benefit to that speech. Commercial speech is narrowly defined as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson*, 557 U.S. at 561; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that speech by businesses on matters of public concern is not "commercial speech," even if the business has a pecuniary interest in the issue).

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5. The majority also erred in asserting (Pet. App. 48a) that domestic producers "typically" oppose petitions because "the domestic industry participant is owned by a foreign company charged with dumping." Giorgio and Chez Sidney have no foreign affiliates with an interest in the relevant petitions.

3. The majority also erred in drawing an analogy to the False Claims Act, 31 U.S.C. § 3729 et seq., which provides a bounty to private parties who assist the government in prosecuting a claim. Pet. App. 43a–44a. As an initial matter, unlike a relator who successfully litigates a suit under the False Claims Act, a producer's mere answer of "support" on a government questionnaire has no relationship to the level of assistance the producer provides to the petitioner. Further, unlike the False Claims Act—in which the relator sues on behalf of the United States—the government's role in an antidumping investigation is that of neutral arbiter, not plaintiff. Thus, whereas the government's interest in a False Claims Act proceeding is always in success of the claim, the government's interest in an antidumping investigation is in the fair resolution of the investigation, even if it does not result in the imposition of duties. *See Chez Sidney*, 442 F. Supp. 2d at 1336–37 ("Determination of injury or its threat in a fair and objective manner is a substantial portion of the ITC's mission.").

In any event, none of the statutes cited by the Federal Circuit condition the payment of a bounty on the content of a party's *speech*. Rather, those statutes reward private parties based on the parties' actions, such as successfully prosecuting litigation or providing information that leads to the recovery of money owed the government. False Claims Act, 31 U.S.C. § 3730(d) (award "depend[s] upon the extent to which the person substantially contributed to the prosecution of the action"); 26 U.S.C. § 7623 (awarding a bounty to whistleblowers who provide information to the IRS depending on "the extent to which the individual

substantially contributed to such action"); 19 U.S.C. § 1619 (payments to persons who provide information leading to the collection of customs duties).

4. Finally, this Court's decisions giving the government leeway to regulate speech under a government-funded program do not support the Act's constitutionality. Pet. App. 40 n.29; Gov't C.A. Br. 12–18. Those decisions are based on the government's interest in deciding how its money is spent, and the recipient's choice to decline the government funding if it does not like the government's message. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991). The speech of domestic producers here, however, does not arise out of their *voluntary* participation in a government-funded program. Rather, the viewpoint expression of domestic producers is *required* by the government, *i.e.*, producers are required to answer the questionnaire and specify a position on the government's proposed enforcement action. Gov't C.A. Br. 18 ("[D]omestic producers are required to respond to ITC questionnaires in antidumping investigations.").

Moreover, even if a producer could decline to answer the questionnaire, the statute would still discriminate on the basis of speech by rewarding those producers who were willing to voice the government's preferred viewpoint. And beyond just rewarding compliant producers, the discriminatory distribution of duties injures producers who do not voice support by subsidizing their competitors. In fact, the distribution of subsidies to Chez Sidney's competitors, and the consequent disadvantage to Chez Sidney in the market place, contributed directly to the end of Chez Sidney's crawfish processing business.

The government also never asserts the purported message that it seeks to convey when it makes "benefit payments" to only those domestic producers that expressed support for the government's investigation. Gov't Br. 17. Nor could it, because the questionnaire does not require domestic producers to say, or to refrain from saying, any particular message specified by the government. Rather, the government simply asks domestic producers to state their views on a core political matter—whether the government should take enforcement action against foreign imports.

II. The Court of Appeals' Decision Warrants This Court's Review

A. The CDSOA Governs Distributions of Millions of Dollars in Antidumping Duties for Years to Come

The CDSOA continues to apply to duties collected on goods that entered the United States through September 30, 2007. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). Because the repeal of the Act is prospective only, distributions under the CDSOA will continue for many more years, and the unconstitutional "support" eligibility condition will continue to govern those distributions.

Antidumping duties are not distributed under the CDSOA until they are finally assessed and collected, a process that can take *five years or more* from the date the goods enter the United States. Commerce finally determines antidumping duties retrospectively, through

a nine- to fifteen-month administrative process that does not begin until up to a year after the date of entry. *See* 19 U.S.C. § 1675(a). Commerce's duty determination is then subject to up to three levels of judicial review. Customs collects duties only after Commerce has finally determined what duties are owed and all judicial review has been exhausted. The collection process too can be time-consuming, particularly if Customs must pursue collection actions against importers or their sureties. Customs itself has acknowledged that the distribution of CDSOA payments will be ongoing "for an undetermined period." Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814, 25,814 (May 29, 2009) (explaining procedures for continued distribution of CDSOA funds).

The Act's continuing, and in some cases increasing, impact is demonstrated by Giorgio's predicament. Customs has informed Giorgio that the questionnaire support condition has operated to deprive Giorgio of the following increasing amounts of CDSOA distributions each year:

Distribution Date	Fiscal Year	Amount
Dec. 2006	2005	$ 481,732.10
Dec. 2007	2006	$ 510,175.99
Dec. 2008	2007	$ 2,189,730.10
Dec. 2009	2008	$ 2,736,167.72

And distributions will continue into the foreseeable future. Additionally, Giorgio is covered by a class action filed on April 7, 2009, seeking to recover from various surety companies over $ 700 million in antidumping

duties that remain uncollected on just four imported products. *Sioux Honey Ass'n v. Harford Fire Ins. Co.*, Ct. No. 09-1141 (Ct. Int'l Trade). If the litigation is successful, the moneys collected will be distributed under the CDSOA. That case alone highlights the large amount of duties potentially still distributable.

In addition to its ongoing significance for duties to be collected in the future, the CDSOA also continues to have an effect on the distribution of previously collected duties. In response to the litigation concerning the constitutionality of the CDSOA, Customs since Fiscal Year 2005 has withheld from distribution the pro rata share of funds allocable to domestic producers who have filed certifications for distribution but are ineligible for distribution due to the petition support requirement. 74 Fed. Reg. at 25,815. There have been some 41 such cases filed. For example, as noted above, Customs is holding nearly $6 million dollars in CDSOA distributions for Giorgio. For Fiscal Year 2009 alone, Customs is withholding a total of $76 million in disputed CDSOA distributions under litigation.[6] If the Act's petition-support requirement is ultimately found unconstitutional, these funds will be distributed to the producers who were eligible for CDSOA distributions but for the petition support requirement.

Additionally, there is ongoing litigation by producers who were denied CDSOA distributions prior to Fiscal Year 2005. These producers seek to obtain distributions

6. *See* U.S. Customs & Border Protection, FY 2009 CDSOA Annual Disbursement Report, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf.

from the Government, and/or to recover their share of distributions paid to other producers who received windfalls due to the CDSOA's unconstitutional support-eligibility requirement. Giorgio, for instance, has claims pending against other domestic producers of preserved mushrooms in the CIT seeking to recover its pro rata share of CDSOA distributions for Fiscal Years 2001–2004. *Giorgio Foods, Inc. v. United States*, Ct. No. 03-00286 (Ct. Int'l Trade). With respect to Chez Sidney, the CIT has affirmed Customs' determination that Chez Sidney would be owed over $1.1 million, which Customs has indicated it would either pay out of future duty collections or recover from other domestic processors who in effect received CDSOA funds that should have been paid to Chez Sidney. *PS Chez Sidney LLC v. U.S. Int'l Trade Comm'n*, 558 F. Supp. 1370, 1375 (Ct. Int'l Trade 2008).

B. The Federal Circuit's Decision Chills Speech Into the Indefinite Future

In addition to the CDSOA's direct, increasing, and consequential financial impact on Giorgio and its competitive position in relation to its domestic competitors that are receiving CDSOA distributions, the Act continues to chill Giorgio's and other producers' political speech because the repeal did not affect the questionnaires. The ITC continues to send domestic producers questionnaires that, under compulsion of law, request producers to express whether they support the government's enforcement actions. In light of the court of appeals' decision, producers are keenly aware that they can be denied valuable government benefits if they do not speak up in support of government action when

responding to these or other government-issued inquiries. Unless this Court corrects the decision below, producers—and their owners and managers—will be wary in responding to future questionnaires from government officials or agencies seeking their viewpoint on public policy issues. Regardless of their actual viewpoint, their responses will be shaped by an understanding that their eligibility for future programs and benefits may be affected if they indicate anything other than support for a proposed action.

C. The Unconstitutionality of the CDSOA Warrants This Court's Review

The court of appeals, with respect to a statute that cannot be reviewed by other circuits, reached the astonishing conclusion that a facially discriminatory penalty on speech was constitutional. That result is an affront to the First Amendment and this Court's precedents. Moreover, because the Act continues to govern ongoing distributions for the indefinite future, it would be unseemly to permit the government to apply a statute that facially discriminates on the basis of speech merely on the say-so of a divided Federal Circuit panel. This Court should decide for itself whether the government's continuing administration of such a large amount of funds is consistent with core values of the First Amendment.

The implications of the court of appeals' reasoning are also disturbing. Stretched to its logical conclusion, the panel's reasoning—that a legislative purpose to assist government enforcement efforts justifies facially discriminatory penalties on speech—could, for example,

support the constitutionality of providing government subsidies to workers who vote for union certification, while denying them to those who vote against, *or vice versa*. Similarly, the Federal Circuit's reasoning suggests that the Department of Defense could condition eligibility for a government contract on a contractor's willingness to sign a statement that it supports the war in Afghanistan. No such scheme should survive scrutiny, yet a divided panel of the Federal Circuit held that Congress may condition eligibility for a government subsidy on a domestic producer's expressed approval of a petition. This Court should review that extraordinary holding.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioners, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U S
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IN THE
Supreme Court of the United States

SKF USA INC.,

Petitioner,

V.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF KOYO CORPORATION OF U.S.A. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Koyo Corporation of U.S.A. ("Koyo")[1] is a domestic manufacturer of products on which an antidumping duty order is in place.[2] Since 1975, Koyo has manufactured tapered roller bearings and ball bearings and continues to make substantial investments in its bearings manufacturing facilities in the United States.

The U.S. antidumping and countervailing duty laws, Title VII of the Tariff Act of 1930,[3] provide the basis for U.S. Customs and Border Protection ("Customs") to assess antidumping duties on imported merchandise subject to an antidumping order. Like Petitioner SKF USA, Inc., Koyo was an interested party that fully participated in the antidumping investigation on Ball Bearings from Japan (among twelve other antidumping and countervailing duty investigations on ball bearings and tapered roller bearings from various countries). It responded to mandatory questionnaires from, and

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[1] The parties have consented to the filing of this *Amicus* brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6 *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] Koyo's parent company is JTEKT Corporation, a manufacturer of bearings located in Japan, formerly known as Koyo Seiko Ltd.

[3] 19 U.S.C. §§ 1671, 1673, *et seq.* (2006).

provided a significant amount of information to, the United States International Trade Commission ("ITC"), the agency responsible in antidumping and countervailing ("AD/CVD") duty investigations for determining whether a domestic industry has been materially injured or threatened with material injury by the relevant imports. As part of the ITC's formal investigation of whether domestic producers, including Koyo, had suffered material injury, *Amicus* stated in its ITC questionnaire response that it did not support the petition for the imposition of antidumping duties.

In 1989, after completion of the ITC investigation, the U.S. Department of Commerce issued the antidumping duty order on ball bearings imported from Japan (the "Order"). *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, & Spherical Plain Bearings, & Parts Thereof From Japan*, 54 Fed. Reg. 20904 (Dep't of Commerce May 15, 1989). In 2000, many years after publication of that Order and therefore many years after Koyo checked a box on its ITC questionnaire opposing the petition, the AD/CVD duty law was amended by the Continued Dumping and Subsidy Offset Act ("CDSOA") commonly known as the "Byrd Amendment." *See* Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1(a), § 1002 (2000), 19 U.S.C. § 1675c (2000 & Supp. 2006). The Byrd Amendment takes antidumping duties collected under an antidumping duty order and pays them to certain domestic producers, who satisfy the "petition support" requirement. Under the "support requirement," eligibility for Byrd Amendment distributions is limited to "Affected

domestic producer[s]" ("ADPs"), who are defined as petitioners or those who supported a petition that led to an antidumping or countervailing duty order. *Id.* § 1675c(b)(1). Customs annually publishes the ADP lists in the Federal Register, along with a notice of intent to distribute AD/CVD duties that were collected in that fiscal year. *Id.* § 1675c(d)(2). Each year, Customs distributes the duty collections, on a pro rata basis, to the ADPs who filed the required certifications with Customs, based on the ADPs' "qualifying expenditures" for that year. *Id.* §§ 1675c(a), 1675c(b)(4), 1675c(d)(2)-(3); 19 C.F.R. § 159.61(a)-(c) (2009).

Koyo is excluded from the ADP lists and from the distribution of duties because it does not satisfy the "support requirement," *i.e.*, publicly expressed support for the petition in the course of the ITC formal investigation.

Since 2001, domestic producers have had access each year to a pro rata share of the AD/CVD duty collections, so long as during the original investigation (which may have occurred years before 2001), they publicly expressed the viewpoint that they supported the petition for the imposition of an antidumping duty order and such order was imposed. Domestic producers who expressed the opposite viewpoint, or no viewpoint, have not received any Byrd Amendment distributions. Domestic producers that compete with Koyo in the U.S. market received Byrd Amendment distributions, placing Koyo and other similarly

situated domestic producers at a significant competitive disadvantage.[4]

Although the CDSOA was repealed prospectively in February 2006, Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title VII, Subtitle F § 7601(a), it continues to apply to AD/CVD duties collected on entries made and filed prior to October 1, 2007, including the Order involved in this case. More than 250 AD/CVD duty orders affecting a variety of industries were in effect at the time of the CDSOA repeal.[5] Determining the final AD/CVD duty liability for entries made before October 1, 2007 under each preexisting order will be a long process, such that the continuing harm to Koyo and other similarly situated producers affected by the discriminatory distributions under the CDSOA to domestic competitors will continue for years to come.[6] For fiscal year 2009, more than 8,000

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[4] For example, the *Fiscal Year 2008 CDSOA Annual Disbursement Report* for thirteen different AD/CVD orders indicates that more than $17 million has been distributed to Koyo's competitors with regard to ball bearings and tapered roller bearings. Available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_annual_rep/final_disbursement.ctt/final_disbursement.pdf (amount aggregated from this report).

[5] *See The Year in Trade 2007: Operation of the Trade Agreements Program (59th Report)*, USITC Pub. 4026, at App. Table A-5 & A-7 (July 2008).

[6] In fiscal year 2009 alone, Customs distributed $247,718,477.35, with an additional $75,845,186.86 set aside for distribution. *See Fiscal Year 2009 Annual CDSOA Disbursement Report*, available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_c

certifications were filed with Customs requesting Byrd Amendment funds.[7]

Koyo's claims for distributions under the Byrd Amendment are pending before the Court of International Trade. *See e.g., Koyo Corp. of U.S.A. v. United States*, No. 06-00324 (Ct. Int'l Trade), consolidated as *Pat Huval Restaurant & Oyster Bar, Inc v. USITC*, Consol. No. 06-00290 (Ct. Int'l Trade).

INTRODUCTION

The Court of Appeals for the Federal Circuit incorrectly applied the First Amendment to permit viewpoint based discrimination against highly-protected political speech in a formal governmental proceeding. The decision of the Federal Circuit conflicts with numerous decisions of this Court, particularly with respect to its application of intermediate tier scrutiny to review governmental discrimination against core political speech made to an administrative agency in the course of a formal government proceeding. *See e.g., Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

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vd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf.

[7] *See U.S. Customs and Border Protection FY 2009 Certifications Received*, available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/09certs_receive.ctt/09certs_receive.pdf.

The erroneous Federal Circuit decision will be controlling authority for many other pending cases over which it has exclusive appellate jurisdiction, and that present the same issue. Current cases and anticipated future cases collectively involve claims exceeding $1 billion, as indicated in SKF USA, Inc.'s Petition.

Unless this Court grants the Petition for a Writ of Certiorari to review the judgment of the Federal Circuit, this case will have an unprecedented outcome by permitting the government acting in its representative capacity to reward private parties with money for supporting certain substantive policy positions in a formal public process.

REASONS FOR GRANTING THE WRIT

The Byrd Amendment's "petition support" requirement is a classic example of a viewpoint discriminatory restriction on political speech that cannot survive strict scrutiny. The Petition should be granted because the Federal Circuit's decision[8] upholding the restriction violates important First Amendment principles established by an unbroken series of this Court's decisions that prohibit viewpoint discrimination against political speech, unless the government can point to a compelling

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[8] *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337 (Fed. Cir.), *en banc rehearing denied*, 583 F.3d 1340 (Fed. Cir. 2009).

governmental interest and demonstrate that the approach taken is the least restrictive alternative. *See e.g. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Although the Byrd Amendment discriminates on its face among members of a domestic industry based on a public policy related viewpoint, the Federal Circuit ignored this discrimination and erred as a matter of law by assessing the statute under the intermediate scrutiny standard. *SKF*, 556 F.3d at 1352, 1355.

The unconstitutionality of the statute is particularly evident because the discrimination occurred in the course of an official proceeding in which a federal administrative agency received the views of the public, including those of Petitioner and of the *Amicus*, and made an important policy decision. Repeated decisions of this Court demonstrate that the First Amendment protection is at its zenith in this context, when a member of the public communicates with the government acting in a representative capacity to inform the government of its views about appropriate policy actions:

> In a representative democracy such as this, these branches of government [the legislature and executive] act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet

> hold, at the same time, that the people cannot freely inform the government of their wishes would impute to [the statute] a purpose to regulate . . . political activity . . . .

Noerr, 365 U.S. at 137.

By conditioning receipt of a monetary payment on the expression of a particular position to the administrative agency charged with making a decision, the Byrd Amendment's petition support requirement restricts political speech and communication with the government as decision-maker. Yet the majority below improperly side-stepped the application of strict scrutiny to assess the statute. Instead, it decided to treat the Byrd Amendment distributions as a "reward" and reached the conclusion that this type of "reward" should be permitted in a commercial context. *SKF*, 556 F.3d at 1355. It then concluded that the "reward" should be reviewed under the intermediate scrutiny standard applicable to commercial speech, although no available First Amendment rationale justified its application to a viewpoint-based discrimination against political speech made to the government acting in its representative capacity.

As Petitioner has shown, in its effort to devise a rationale, the majority's formulation conflicts in several respects with principles established by prior decisions of this Court. In particular, the majority erred by asserting that a different standard applies to "prohibitions" of speech and the type of unvarnished viewpoint discrimination involved here, and that a finding of benign purpose for the statute

is sufficient to convert the standard of review from strict scrutiny to intermediate scrutiny. *Id.* at 1349. However, the majority's theory of a saving "reward" purpose is invalid because in trade remedy investigations the government is not acting as a litigant before a court, seeking to protect its proprietary interest, but is acting in a representative capacity, in a matter of public policy.

Finally, the decision below warrants review because of the continuing harm the Byrd Amendment will cause to scores of domestic producers excluded from receiving benefits and the potential danger this decision presents to critical First Amendment rights if it is permitted to stand. Koyo and other similarly situated domestic producers, including those that are parties to more than 41 cases pending in the lower court (over which the Federal Circuit has exclusive jurisdiction), will suffer continuous harm because some domestic competitors will continue to receive a stream of Byrd Amendment payments for many years to come.

At a broader level, the Federal Circuit's decision establishes a new and unwarranted exception to the application of strict scrutiny to content-based restrictions on political speech. The dissent warned against the creation of "a whole new category of speech – speech in circumstances that are 'similar to' commercial speech" which is then subject "to much less rigorous scrutiny under the First Amendment than it would otherwise receive." *SKF*, 583 F.3d at 1343. In characterizing the impact of the panel's decision as "far reaching," the dissent properly concluded that "[t]his case is simply too

important to allow the majority's incorrect First Amendment analysis to stand." *Id.*

ARGUMENT

I. The Federal Circuit Erred, As a Matter Of Law, by Failing to Assess an Explicit Viewpoint Based Discrimination Against Political Speech Under the Strict Scrutiny Standard

A. The Federal Circuit's Decision Violates Important First Amendment Principles Established By An Unbroken Series of This Court's Decisions Prohibiting Viewpoint Discrimination Against Political Speech

The First Amendment prohibits the government from discriminating among speakers based on the viewpoint they express, unless it can satisfy the strict scrutiny standard. The government may not discriminate based on viewpoint by disadvantaging or burdening those who have an opposite view or by requiring entities to utter a particular viewpoint to qualify for government benefits. *See e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Rosenberger*, 515 U.S. at 829. A viewpoint-based discrimination is presumed unconstitutional in these circumstances and is subject to strict scrutiny even if the political speech involves economic matters. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[The government] . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.")

The Court has recognized that preventing a speaker from receiving monetary compensation can curtail speech by eliminating an economic incentive for the entity to speak. In *Simon & Schuster*, the Court declared unconstitutional under the First Amendment a statute that denied a criminal the income from communications describing his crime and required that these funds be deposited in a trust account to be made available to victims of his crimes. The underlying statute did not prohibit any speech. Rather, it established "a financial disincentive to create or publish works with a particular content." *Simon & Schuster*, 502 U.S. at 118.

In reaching this conclusion, the Court stated that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115. The Court quoted with approval its decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), where it had invalidated a content-based magazine tax on the ground that such "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."

As the Court explained, "This is a notion so engrained in our First Amendment jurisprudence" that it has found it "so 'obvious' as to not require explanation." *Simon & Schuster*, 502 U.S. at 115-16, quoting *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). This rule is but one manifestation of a far broader principle: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the

First Amendment." *Simon & Schuster*, 502 U.S. at 116, quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

Simon & Schuster reinforced the conclusion of *Leathers* that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 116, quoting *Leathers*, 499 U.S. at 448-49.

The majority's decision, which purports to draw a distinction between "prohibitions" of speech and viewpoint discriminatory restrictions on speech, is squarely inconsistent with this Court's First Amendment precedents. Moreover, the Court has specifically rejected the majority's position that an alleged benign governmental purpose can save this type of viewpoint-based discrimination. The Court has rejected the argument that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. "[O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster*, 502 U.S. at 117, quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

Further, in *United States v. National Treasury Employees Union*, the Court found that a government "prohibition on compensation unquestionably imposes a significant burden on expressive activity" and "induces" those covered by the statutory restriction "to curtail their expression"

in order to prevent adverse effects on their financial situation. 513 U.S. 454, 468-70 (1995), citing *Simon & Schuster*. *See also Speiser v. Randall*, 357 U.S. 513 (1958), where the Court declared unconstitutional a state law conditioning a tax exemption to a signed declaration of loyalty to the U.S. government. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518.

The Byrd Amendment's "petition support" requirement is virtually indistinguishable from the unconstitutional limitations on speech at issue in this line of cases, which establishes that restrictions on payment for speech constitute infringements on expression that must satisfy the strict scrutiny standard in order to survive review.

B. The Byrd Amendment Embodies Classic Viewpoint Discrimination Involving Political Speech

The Byrd Amendment provides benefits to an entity that "was a petitioner or interested party in support of the petition with respect to which" AD/CVD duties were ordered. 19 U.S.C. § 1675c(b)(1)(A). This provision explicitly directs the ITC and Customs to discriminate among domestic producers found to be injured by dumped imports in the distribution of Byrd Amendment subsidies based solely on whether a producer publicly expressed "support" for a petition that led to an AD/CVD order. *Id.* § 1675c(b)(1). Koyo was denied Byrd Amendment distributions because like Petitioner SKF USA, in its questionnaire response to the ITC many years before

the enactment of that law, Koyo did not check the box asking whether it supported the petition. On its face, the Byrd Amendment thus embodies a content-based discrimination that both rewards entities whose speech is consistent with a specific policy view about the desirability of government action and punishes those whose speech takes an opposing point of view.

The majority rejected the government's position in this litigation that the Byrd Amendment's petition support requirement was not viewpoint discriminatory. *SKF*, 556 F.3d at 1351. It did not, however, assess the statute under the strict scrutiny standard. Instead, the majority applied the lesser degree of constitutional protection afforded commercial speech. It cited no authority that permitted such use of the intermediate scrutiny standard to assess the validity of political speech in a public forum.

In sum, the Federal Circuit's decision conflicts with numerous decisions of this Court. The Petition should be granted in light of the importance of the First Amendment rights that have been violated by the decision below.

II. The Viewpoint Based Discrimination Accomplished By the Byrd Amendment Is Particularly Pernicious Because it Occurred in the Course of a Formal Procedure in Which the Government Sought to Determine How to Exercise its Authority and in Which All Citizens Have an Equal Right to Participate and be Heard

A. Speech Made By Private Parties in the Course of a Formal Governmental Decision-Making Process Enjoys Heightened First Amendment Protection

First Amendment protections are at their zenith when the communication at issue is political speech that occurs in a public forum maintained by the government. *Boos v. Barry*, 485 U.S. 312 (1988). As this Court said in *Mills v. Alabama*, 384 U.S. 214, 218 (1966), "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." Political speech in various types of public forums, whether petitioning Congress for taking a certain action or submissions to government agencies in administrative proceedings, implicates broader First Amendment protections: not only the right to freedom of speech but also the right to petition the government for redress of grievances. *See* U.S. CONST. amend. I. The Byrd Amendment's petition support requirement impermissibly burdens both fundamental rights, requiring *a fortiori* that the

statute be assessed under the strict scrutiny standard.

This Court's jurisprudence has long recognized the vital nature of the right to petition the government for redress of grievances. *McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First Amendment] . . ."); *Noerr*, 365 U.S. at 136; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).[9] The *Noerr-Pennington* line of cases is clearly meant to protect the ability of the government acting in its representative capacity to take measures that affect competition and the ability of citizens to request or oppose such government action without threat of discrimination or retribution for the substantive position they take. *Noerr*, 365 U.S. at 137; *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993). As the *Noerr* Court noted, petitioning activity is by its nature "directed toward obtaining governmental action." 365 U.S. at 140.

In *Noerr* the Court addressed an antitrust challenge to a lobbying and publicity campaign. Because lobbying and speech "raise[d] important constitutional questions," the Court held that Congress did not intend the Sherman Act to "apply

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[9] *See* Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 Hous. L. Rev. 1299, 1303-09, 1342-43 (2003) (discussing the development of the right to petition under the First Amendment and the application of the strict scrutiny standard).

to the activities of the railroads at least insofar as those activities comprised mere solicitation of government action with respect to the passage and enforcement of laws." *Id.* at 138. The Court was concerned that

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to [the statute] a purpose to regulate . . . political activity . . . .

Id. at 137.

The Court further explained that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

In *Pennington*, the Court extended the *Noerr* protection to lobbying efforts designed to influence executive officials performing commercial and political duties. 381 U.S. at 670. In *California Motor Transport Co. v. Trucking Unlimited*, the Court further extended the right to petition to administrative agencies and courts: "The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." 404 U.S. 508, 510 (1972). Having explained that the right to petition "extends to all

departments of the Government," the Court concluded that:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.

Id. at 510-11 (emphasis added).

The need for strict scrutiny on speech when the government is acting in its representative capacity is confirmed by *Professional Real Estate Investors*, 508 U.S. at 5. The Court stressed the First Amendment protection on the free flow of communications to the government:

> We reasoned that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." (citations omitted).

In *BE & K Constr. Co.*, the Court applied the *Noerr* principles outside the competition context to labor disputes. *BE & K Constr. Co. v. NLRB*, 536

U.S. 516, 525-527 (2002).[10] Retracing the origins of the *Noerr* doctrine, the Court affirmed its continued application and the view that the government cannot penalize a party for its protected speech absent both objective and subjective evidence of bad faith. Most recently, the Court relied on the *Noerr* line of cases in holding unconstitutional under the First Amendment a law that "placed restrictions on political speech based on the speaker's corporate identity..." *Citizens United v. FEC*, 558 U. S. ___, No. 08-205, slip op. at 32 (Jan. 21, 2010).

The majority acknowledged that SKF USA's opposition to the antidumping petition in the ITC investigation is protected First Amendment activity. *SKF*, 556 F.3d at 1354, citing *Professional Real Estate Investors* and *California Motor Transport*. Any action by an administrative agency to punish a petitioner for exercising a fundamental constitutional right to inform the government of its views about appropriate policy actions must be subject to the highest level of scrutiny, not some lower intermediate form.

B. The Court Should Grant Review Because of the Dangerous Nature of the Precedent Established by the Federal Circuit's Incorrect First Amendment Analysis

The Court should grant review because the Federal Circuit's decision would constitute an

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[10] *See also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), applying *Noerr* principles to the National Labor Relations Act.

important precedent permitting the government to reward citizens with money for supporting in a formal public process the substantive policy position adopted by the government. This outcome is unprecedented and the potential for abuse is chilling.

As explained by the dissent, in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002), the Sixth Circuit overturned a similar effort by a government to discriminate on the basis of viewpoint regarding political speech that occurred in a referendum process. *SKF*, 556 F.3d at 1376. *Lac Vieux* supports SKF USA's position here, holding that the discriminatory ordinance at issue was subject to strict scrutiny. 172 F.3d at 409-10.

Equally important, the injurious effects of the Byrd Amendment will continue even after the last distribution under this statute is made. Domestic producers in future AD/CVD proceedings may be compelled to express a viewpoint in favor of governmental action in order not to foreclose potential future access to similar monetary benefits. *See id.* at 407 (noting the chilling effect on speech as "limit[ing] the ability of persons or entities to take a particular political position freely.")

The fact that Congress has authorized the government to award money to private parties that take substantive positions that agree with a particular policy outcome – here, the imposition of duties – and to deny recovery to those who oppose such action is a dangerous innovation whose legality

should be reviewed before it can serve as a precedent supporting future actions by Congress to discriminate based on viewpoint in the award of money in other contexts. *See Illinois v. Krull*, 480 U.S. 340, 352 (1987) ("[T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes.").

III. The Federal Circuit's "Reward" Theory Fails Because in Trade Remedy Investigations the Government Acts in a Formal, Representative Capacity, and Not As an Injured Party Seeking Redress

In assessing the Byrd Amendment under the intermediate scrutiny standard, the majority articulated two rationales, not advanced by the government, that purportedly justified the discrimination: that (1) the statute was designed to reward parties who supported government policy in enforcing U.S. trade laws, and (2) petitioners/supporters of the imposition of an AD/CVD order occupy the same position as plaintiffs in *qui tam* actions. *SKF*, 556 F.3d at 1352. Neither rationale is a valid basis for the majority's First Amendment analysis. Moreover, the government expressly disclaimed before the Federal Circuit the "reward" theory on which the majority decided the case. *Id.* at 1350; *SKF*, 583 F.3d at 1342.

A. The Government Was Acting in its Representative Capacity in the ITC Proceeding

The majority's "reward" theory is rooted in the incorrect premise that issuance of a remedial order in an AD/CVD proceeding is equivalent to a successful *qui tam* judgment. *SKF*, 556 F.3d at 1355-57. On that basis, the majority reasoned that a Byrd Amendment distribution is properly considered a bounty for supporters of the order. *Id.* However, the two proceedings are fundamentally different, and the government acts in a different capacity in the two proceedings.

A *qui tam* suit is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government . . . will receive." *Black's Law Dictionary* 1282 (8th ed. 2004). For example, the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b) (2006) permits private parties to combat fraud against the United States by bringing a civil action against a person who submitted a false claim. *See e.g. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

Qui tam plaintiffs ("relators") are volunteer prosecutors, motivated by the prospect of personal gain, that sue to redress a fraud against the government in its proprietary capacity. While the *qui tam* relator may obtain a portion of the penalty as a bounty for prosecuting a successful action, it is the government that is the injured party. *Vermont Agency*, 529 U.S. at 772-73; *see also Hughes Aircraft*,

520 U.S. at 949 (relators "are motivated primarily by prospects of monetary reward rather than the public good"). In fact, the *qui tam* relators are not injured by defendants' conduct and lack direct standing.[11] It is a unique feature of *qui tam* statutes that relators are granted derivative standing to sue to redress an injury suffered by the government in its proprietary, as opposed to representative, capacity. *Vermont Agency*, 529 U.S. at 771. Further, the *qui tam* relator's "reward" is not contingent on the expression of a particular viewpoint required by statute.

Unlike *qui tam* provisions, the Byrd Amendment and the AD/CVD laws are not anti-fraud statutes. In AD/CVD investigations, the government and AD/CVD petition supporters play fundamentally different roles than parties in a *qui tam* action. The AD/CVD petition supporters seek to persuade a federal agency, acting in its representative capacity, that they have been directly injured by unfair competition from foreign imports and to remedy that injury through imposition of duties. Their communication with the government in its representative capacity is akin to the protected petitioning activity under *Noerr-Pennington*.[12] They are seeking to enforce their own rights, not those of the government. In doing so, they are compelled to express a point of view to the ITC: that they support the imposition of an AD/CVD order.

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[11] J. Boese, *Civil False Claims and Qui Tam Actions* 1-4 - 1-7 (3d. ed. 2006).

[12] As noted *supra* at page 18, SKF USA's opposition to the antidumping petition in the ITC investigation is protected First Amendment activity under *Noerr*.

The ITC does not act as a private litigant seeking recovery for fraudulent actions, but is a neutral fact-finding and decision-making body with respect to matters of trade policy. Specifically, in an AD/CVD investigation, the ITC plays: (1) an investigative role, in which it sends questionnaires to domestic producers who may either support or oppose the imposition of AD/CVD duties, analyzes this data, conducts independent research, and issues a comprehensive analysis; and (2) a decision-making role, in which it determines the existence of material injury to the domestic industry.[13] The ITC conducts the investigative and decision-making roles in its representative capacity and may not share or decline its responsibility. [14]

A priori every completed investigation represents the "successful enforcement of AD/CVD laws," regardless of whether it results in issuance of AD/CVD orders or not. The ITC's statutory responsibility is fulfilled by a determination of whether there is a need for relief under the statutory standards.

The majority thereby erred in finding that petitioners "help" the government or take a position "favorable to" the government. *SKF*, 556 F.3d at

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[13] *See* 19 C.F.R. §§ 207.8, 207.20-29 (2009); 19 U.S.C. §§ 1671b, 1673b(b) (2006).

[14] Similarly, "[i]n making a determination of threat of material injury, ITC must weigh industry views and views of other interested parties, together with all other relevant economic factors as appropriate. . . ." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994).

1356-57. The majority's analogy of Byrd Amendment distributions to bounties is wrong and cannot justify the statute's discrimination against protected speech.

B. The "Reward" Theory Is Invalid Because There is No Connection Between the Support Granted By a Party in the Course of the Formal ITC Investigation and the Amount of the Benefit Received

The language of the Byrd Amendment and the manner in which distributions are made refute the majority's "reward" theory. First, under the majority's reading of the statute, once an entity has provided assistance to the ITC in an investigation, it should be eligible for Byrd Amendment distributions. *Id.* at 1352. But that is not how the statute operates. Instead, the qualifying expenditures to which distributions are tied are not based on a one-time determination. 19 U.S.C. §§ 1675c(a), 1675c(b)(4), 1675c(d)(2)-(3). Rather, Byrd Amendment distributions are made only to an entity that meets the definition of "affected domestic producer" each time it applies for benefits and has "qualifying expenditures" at that time.

Second, eligibility for Byrd Amendment distributions is not related to the information provided to the ITC in the investigation, or its quality/substance/volume, as would be expected if the distribution mechanism actually functioned as a "reward."[15] Further, responses to the ITC

[15] In fact, an entity who merely checked the "petition support" box in the ITC questionnaire can receive larger distributions

questionnaires are mandatory and a failure to respond can result in a subpoena or other order to compel the submission of records or information. 19 U.S.C. § 1333(a). The mandatory nature of the ITC questionnaires is inconsistent with the majority's reading of the statute.

Third, under the "reward" theory, once a party has been determined to have assisted the ITC in an investigation, it should be eligible for Byrd Amendment distributions for as long as funds are available. But that is not true for all such parties. Section 1675c(b)(1) provides that a party who supported and assisted in the original investigation and then "ceased the production of the product covered by the order or finding . . . shall not be an affected domestic producer." It thus will not be eligible to receive distributions, even though it may have qualifying expenditures that had not yet been reimbursed through Byrd Amendment distributions. 19 U.S.C. § 1675c(b)(4). The fact that a company can support the AD/CVD petition, and then receive no benefits if it ceases to manufacture the covered product at any time after the AD/CVD order is issued, contradicts the majority's depiction of the statute's purpose.

The Byrd Amendment permits members of the domestic industry to receive subsidies from the government (payment of part of the duties imposed under an AD/CVD order) upon one condition -- if and only if the producer publicly expressed support for the petition in the course of the administrative

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than an entity who supported the petition with significant information and analysis.

proceeding. *Id.* § 1675c(a). That is, to receive monetary benefits from the government in its representative capacity, a company need only check a box on an ITC questionnaire when it responds to compulsory process for production of information. Accordingly, the Federal Circuit erred by basing its decision on the fatally flawed "reward" theory.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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